DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-357
Title: Giridhar C. Sekhar, Petitioner
v.
United States
Docketed: September 24, 2012
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (11-4298)
Decision Date: June 26, 2012

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 19 2012	Petition for a writ of certiorari filed. (Response due October 24, 2012)
Oct 16 2012	Order extending time to file response to petition to and including November 23, 2012.
Nov 20 2012	Brief of respondent United States in opposition filed.
Nov 28 2012	Reply of petitioner Giridhar C. Sekhar filed.
Dec 5 2012	DISTRIBUTED for Conference of January 4, 2013.
Jan 7 2013	DISTRIBUTED for Conference of January 11, 2013.
Jan 11 2013	Petition GRANTED.
Feb 11 2013	SET FOR ARGUMENT ON Tuesay, April 23, 2013.
Feb 25 2013	Joint appendix filed. (Statement of costs filed)
Feb 25 2013	Brief of petitioner Giridhar C. Sekhar filed.
Mar 1 2013	CIRCULATED.
Mar 4 2013	Brief amici curiae of National Association of Criminal Defense Lawyers and the Cato Institute filed. (Distributed)
Mar 27 2013	Brief amicus curiae of the United States filed. (Distributed)
Apr 15 2013	Reply of petitioner Giridhar C. Sekhar filed. (Distributed)
Apr 23 2013	Argued. For petitioner: Paul D. Clement, Washington, D. C. For respondent: Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
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12-357

No. _____

IN THE
Supreme Court of the United States

GIRIDHAR C. SEKHAR,

Petitioner,

-v.-

UNITED STATES OF AMERICA

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "recommendation" of an attorney, who is a salaried employee of a governmental agency, in a single instance, is intangible property that can be the subject of an extortion attempt under 18 U.S.C. §1951(a)(the Hobbs Act) and 18 U.S.C. §875(d).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction of the district court is reported at 683 F.3d 436 (2d Cir. June 26, 2012) and appears in the Appendix at 1a. The opinion of the district court denying Petitioner's motion to dismiss the indictment is not reported and appears in the Appendix at 14a. The opinion of the district court denying petitioner's motion for a judgment of acquittal is not reported and appears in the Appendix at 68a.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2012. (Pet. App. 1a-13a) This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1951(a) provides:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

18 U.S.C. §1951(b)(2) defines extortion as follows:

> "The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

18 U.S.C. §875(d) provides:

> "Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both."

STATEMENT OF THE CASE

A. Proceedings in State Court

In October, 2009, Giridhar Sekhar was the managing partner of a venture capital firm called FA Technology Ventures. At the time, the New York State Comptroller, the sole trustee of the New York public employee pension fund (Common Retirement Fund), was considering whether to invest pension fund assets in a fund being raised by FA Technology Ventures. If the Comptroller believes an investment

is worthwhile, the Comptroller issues a document called a "Commitment". The Commitment, however, does not commit the Comptroller to making the investment and provides the recipient with no legally enforceable rights. Rather, a Commitment, as the evidence at trial established, is a non-binding letter of intent that cannot be enforced, the Comptroller need not act upon it, and it may be unilaterally withdrawn. (Pet. App. 2a)

Luke Bierman was formerly the General Counsel to the New York State Comptroller; a salaried employee of the Comptroller who did not maintain a law practice. In October, 2009, Mr. Bierman circulated a memorandum recommending against investing in the FA Technology Ventures fund. (Pet. App. 3a) On November 17, 2009, Mr. Bierman, received an e-mail that recited that it was sent by an employee of the Comptroller's Office and requested that Mr. Bierman provide a personal e-mail address so that the sender could reveal what the sender characterized as unethical conduct on the part of one or more employees of the comptroller's Office. (Pet. App. 4a) Mr. Bierman provided a personal e-mail address and the next day received an e-mail that alleged that Mr. Bierman had inappropriately blackballed an investment fund. (Pet. App. 4a)

According to the e-mail, Mr. Bierman acted unethically in blackballing the recommendation of the investment staff on the fund and also accused him carrying on an affair with an individual in the Comptroller's Office. The e-mail directed Mr. Bierman to tell the Comptroller that he had had a change of heart and to recommend moving forward

with this fund. The e-mail threatened that if the demand was not complied with, the information regarding the alleged paramour would be disclosed to among other people, Mr. Bierman's wife. (Pet. App. 4a)

Over the next several days, Mr. Bierman received a number of follow-up e-mails inquiring about the status of his recommendation and reiterating the threat. In none of the e-mails did the sender make a demand that money or other tangible property be delivered up to the sender or a third person. Headers contained in the e-mails revealed that the e-mails were sent from at least three different IP addresses. One of the IP addresses was traced to a computer with a physical location at Mr. Sekhar's residence in Brookline, Massachusetts. Another e-mail was traced to the offices of FA Technology Ventures. (Pet. App. 4a)

A search warrant was executed at Mr. Sekhar's residence on December 3, 2009, and following an investigation, Mr. Sekhar was charged in state court in Albany County, New York with the crime of Attempted Grand Larceny in the First Degree by extortion. See, N.Y. Penal Law §§155.05(2)(e) and 155.42 (McKinney 1965, 1986). That charge was eventually dropped by prosecutors in state court and Mr. Sekhar was charged with Attempted Coercion in the First Degree. See, N.Y. Penal Law §135.65 (McKinney 2008). (Pet. App. 28a) The case proceeded in state court until October of 2010, when it was dismissed and a felony complaint charging one count of Interstate Transmission of Extortionate Threats in violation of 18 U.S.C. §875(d)

was filed in U.S. District Court for the Northern District of New York. (Pet. App. 35a)

B. Proceedings in District Court

On December 3, 2010, a grand jury sitting in the Northern District of New York returned an indictment charging Mr. Sekhar with one count of Extortion under 18 U.S.C. §1951(a) (The Hobbs Act) and six counts of Interstate Transmission of Extortionate Threats under 18 U.S.C. §875(d). (Pet. App. 5a) Throughout the proceedings in Federal Court, Mr. Sekhar maintained that the conduct that the Government alleged Mr. Sekhar engaged in does not constitute attempted extortion, because no property was ever demanded or attempted to be obtained from the victim. The indictment alleged that Mr. Sekhar attempted to obtain a "Commitment, the Comptroller's approval of the Commitment, and the General Counsel's recommendation to approve the Commitment, with the General Counsel's consent". (Pet. App. 5a) Mr. Sekhar moved to dismiss the indictment as insufficient on its face, because it did not allege that defendant attempted to obtain property from the general counsel that was a source or element of wealth that could be sold, transferred or exercised as required by *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003). The Government opposed Mr. Sekhar's motion and alleged that the "property" was the "General Counsel's right to make business decisions free from interference", notwithstanding the fact that the indictment alleged that the property was a "recommendation". By Decision and Order dated March 28, 2011, the District Court (McAvoy, J.) denied Mr. Sekhar's

motion to dismiss the indictment for facial insufficiency. (Pet. App. 25-26a)

In it's decision denying Mr. Sekhar's pretrial motion to dismiss that portion of the indictment that alleged that the property that Mr. Sekhar attempted to obtain was the General Counsel's recommendation to approve the Commitment, the District Court made a finding that the recommendation was property, because the General Counsel had an intangible property right to make *professional* decisions without outside pressure and because it related to the Commitment, which the District Court believed was something that could be sold, transferred, or exercised for value. (Pet. App. 24a) However, the evidence adduced on the Government's case was that the Commitment was not something that could be sold, transferred, or exercised for value.

At trial, Mr. Sekhar moved for a judgment of acquittal after the Government's case and after all the proof was submitted to the jury on the ground that the Government failed to prove that Mr. Sekhar had attempted to obtain property from the General Counsel. The District Court reserved decision on Mr. Sekhar's motions. In a pre-charge conference, the District Court indicated that it intended to charge the jury to the effect that intangible property rights include the right to make various business decisions free from outside pressure. Mr. Sekhar objected to the court's proposed charge on the ground that it constructively amended the indictment. Over Mr. Sekhar's objection, the District Court charged the jury consistent with its stated intention at the pre-charge conference. (Pet. App. 75a) At no time did the District Court define what a "business decision" was,

nor was there any proof adduced that the victim was actively engaged in the business of practicing law for profit.

Based upon the foregoing charge, the jury returned a verdict convicting Mr. Sekhar of one count of Attempted Extortion and five counts of Interstate Transmission of Extortionate Threats. Mr. Sekhar was acquitted of one count of Interstate Transmission of Extortionate Threats. A special verdict form was submitted to the jury by the District Court that directed the jury to specify in its verdict what property the defendant attempted to obtain. On all counts where a guilty verdict was returned, the jury specified that the "property" sought to be obtained was "the General Counsel's recommendation to approve the Commitment". (Pet. App. 5a)

Following the verdict, Mr. Sekhar moved for a judgment of acquittal arguing that a "recommendation" is not property; that there was no proof adduced that the General Counsel was engaged in a business enterprise such that defendant could be said to have deprived the General Counsel of a property right relating to "business decisions" of the General Counsel. Defendant argued that there was no property right belonging to the General Counsel relating to the recommendation that defendant attempted to obtain. The District Court denied Mr. Sekhar's motion. (Pet. App. 93a) Mr. Sekhar was Mr. Sekhar to fifteen months incarceration in the Federal Bureau of Prisons on each count he was convicted of with each sentence running concurrently. Mr. Sekhar is currently serving his sentence.

C. Proceeding in the Court of Appeals

In the Court of Appeals for the Second Circuit, Mr. Sekhar challenged both the denial of his pretrial motion to dismiss the indictment as facially insufficient and the denial of his Rule 29 motion for a judgment of acquittal on the same grounds: that thing that the indictment alleged Mr. Sekhar attempted to obtain, a recommendation, is not property. The Court of Appeals, however, characterized the issue before it as whether the general counsel's *right to make recommendations* constituted property; not whether a recommendation, a thing that as a matter of fact and law can not be sold, transferred, or exercised, constituted property. The Court of Appeals determined that the victim, who was employed as an attorney with a state agency, had a property right in his ability to make recommendations to his employer free from threats. (Pet. App. 8a-9a)

According to the Court of Appeals, the General Counsel's right to make a recommendation is a property right because a lawyer's "stock in trade is the sale of legal services", citing to a case decided by the Court of Appeals for the First Circuit dealing with the issue of what are appropriate costs chargeable to plaintiffs in a mass tort litigation case. See, *Massaro v. Chesley (In re San Juan Dupont Plaza Hotel Fire Litig.)*, 111 F. 3d 220 (1st Cir. 1997) In *Massaro*, the First Circuit, in disallowing certain photocopying costs, cited in a footnote to an American Bar Association ethics opinion to the effect that it is unethical conduct for an attorney to charge his client more than the actual costs of photocopying because "[t]he lawyer's stock in trade is the sale of

legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services". See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379.

But the Court of Appeals for the Second Circuit went much further than finding a "property right" in the advice given by an attorney. The Second Circuit made the astonishing pronouncement that in an extortion prosecution under the Hobbs Act, the purported property right that is the subject of the extortion need not be a source of wealth for the target of the extortion: That is, it need not be property in the victim's hands. According to the Second Circuit, '[t]he concept of property . . . does not depend upon a direct benefit being conferred on the person who obtains the property.'" Rather, according to the Court of Appeals, what makes the conduct extortion is that the thing extorted would have had some value to the defendant if it were acquired by the defendant and the coercive act was done "in order to profit". (Pet. App. 12a, 13a) Had the recommendation been made by the General Counsel and a Commitment issued, neither Mr. Sekhar nor his company would have obtained anything of intrinsic value that could be sold, transferred or exercised. Rather, according to the court of appeals:

> "[A] positive recommendation by the General Counsel would have increased the chances the Comptroller would issue a Commitment; a Commitment was necessary for FA Tech III to receive a Pension Fund investment; and an investment would have resulted in

> management fees for FA Technology and profit for Sekhar, as a managing partner. And the evidence showed that Sekhar understood that line of causation. Accordingly, there was sufficient evidence to conclude that Sekhar, in order to profit, attempted to exercise the General Counsel's property right to make recommendations. The government was not required to prove that Sekhar would actually have been enriched had he succeeded in exercising that right. Opportunities have value." (Pet. App. 13a)

REASONS FOR GRANTING THE WRIT

The instant case is another of several cases decided after this Court's decision in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003)[1] wherein the primary, indeed, the determinative issue on the appeal is the one that this Court elected to not address in *Scheidler II*: What constitutes intangible property, and to what degree can it be the subject of extortion under the Hobbs Act. The decision of the Court of Appeals for the Second Circuit expands the boundaries of intangible property beyond recognition and undermines the central holding of *Scheidler II* that extortion and

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[1] The *Scheidler* case cited above is the second in a series of related cases decided by this Court. It is sometimes referred to as *Scheidler II*. Both the District Court and the Court of Appeals for the Second Circuit refer to this Court's decision in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003) as *Scheidler II*. For the sake of consistency Petitioner will likewise refer to this case as *Scheidler II*.

coercion are separate and distinct offenses, only one of which is reached by the Hobbs Act.

In *Scheidler II*, this Court took the opportunity to correct a legal theory that had been advanced by prosecutors and adopted in some Circuits to the effect that in order to establish a violation of the Hobbs Act, the Government need only prove that the defendants interfered with or deprived the victim of some identifiable property right. *Scheidler II* effectively overruled a number of circuit court decisions (e.g. *United States v. Arena*, 180 F.3d 380 [2d Cir. 1999] *cert. denied* 531 U.S. 811 [2000]) that had sustained Hobbs Act convictions where the Government failed to prove that the defendant (besides merely depriving the victim of property) acquired the property for himself or another person. In order to support a conviction under the Hobbs Act, the Government's evidence must establish not only that the defendant deprived the victim of property, but also that the defendant acquired the property for his own use.[2]

This Court in *Scheidler II* did not however, address the issue of whether the intangible "property" that the victim was purportedly deprived of was in fact property. Indeed, this Court specifically cautioned in a footnote that "the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as

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[2] The term "extort" as used in 18 U.S.C. §875(d) has been held to have the same meaning as "extortion" under the Hobbs Act. See, *United States v. Jackson*, 180 F.3d 55 (2d Cir. 1999). Thus, in order to sustain a conviction under 18 U.S.C §875(d), the Government must prove that defendant acted with the intent to extort property from the victim.

United States v. Tropiano, 418 F. 2d 1069 (2d Cir. 1969), in which the Second Circuit concluded that the intangible right to solicit refuse collection accounts 'constituted property within the Hobbs Act definition'". *Scheidler v. National Organization for Women*, 537 U.S. 393, 402 (2003) Rather, this Court observed that "[w]e need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets". *Scheidler v. National Organization for Women*, 537 U.S. 393, 402 (2003)

In the instant case the Second Circuit's decision undermines this Court's holding in *Scheidler II* that extortion under the Hobbs Act requires proof of both a deprivation of property from the victim and an acquisition of the same property by the defendant or another by radically changing the definition of "property" in three fundamentally erroneous respects: First, the Court of Appeals sanctioned the District Court's constructive amendment of the indictment by converting the property that was the subject of the charge from the "General Counsel's recommendation to approve the Commitment" into the General Counsel's "right to make a recommendation". Second, the Court of Appeal's application of a "stock in trade" analogy to the advice given by any lawyer effectively transforms the result of any coercive act into "property", if the defendant does the coercive act to effect a business, professional or work related "decision". Third, the Court of Appeals held that the Government need not establish that the "property" which is the subject of the extortion have any value to the victim; that in order

to constitute property, the thing sought to be obtained need only be of some benefit to the defendant. The Second Circuit eliminated *Scheidler II*'s requirement that the defendant attempt to obtain something of value that is capable of being sold, transferred or exercised by redefining intangible property to include any indirect benefit to the defendant. Under the Second Circuit's reading of the Hobbs Act, any coercive act, done with the intent to obtain a benefit, from any source whatsoever, becomes extortion because the actor is "exercising" the victim's "property right" to make a particular decision in order to obtain something of value from someone or some place else. The Court of Appeal's decision effectively eliminates the distinction between the offense of extortion and the separate offense of coercion which is not a crime under federal law and it stands in conflict with this Court's decision in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003). The Second Circuit's decision exponentially expands the reach of prosecutors to pursue federal charges in what are essentially state court coercion cases. The Court of Appeal's decision also stands in conflict with the decision of the Court of Appeals for the Ninth Circuit in *United States v. McFall*, 558 F.3d 951 (9th Cir. 2009) wherein it was held that coercing a competitor to refrain from bidding a contract is not extortion because the defendant was only seeking to obtain some speculative benefit for himself by hindering a competitor rather than seeking something from the victim that the victim had a vested right in.

The instant case presents an important question of federal law that has not been, but should be, settled by this Court: What constitutes intangible

property under the Hobbs Act and 18 U.S.C. §875(d). In addition, the Second Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter: Whether the obtaining of something that is of no direct benefit to the defendant constitutes the obtaining of property under the Hobbs Act.

I. A Recommendation is not Property That Can be the Subject of an Extortion Prosecution Under the Hobbs Act or 18 U.S.C. 875(d) and the Second Circuit's Determination that it is Conflicts with this Court's decision in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003).

A. The Circuit Court's Improper Substitution of "The General Counsel's Right to Make a Recommendation" for "Recommendation" as the Property That was the Subject of the Indictment Laid the Foundation for the Court to Find That Mr. Sekhar Attempted to Obtain a "Property Right" from the General Counsel That Could be "Exercised" by Mr. Sekhar.

The crime of extortion as defined in the Hobbs Act is the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." There exists a crucial distinction between the crimes of coercion and extortion. The crime of coercion is committed when an individual is compelled or induced by another person to engage in conduct that he has legal right to abstain from engaging in, or to abstain from engaging in conduct

that he has a legal right to engage in, upon a threat that if the demand is not complied with, the actor or another will cause physical injury to another, expose a secret, damage property, cause criminal charges to be instituted, etc.. See e.g. New York Penal Law §135.60. The crime of extortion is committed when the victim is coerced into doing the act of delivering property to another person.

The distinction between the crimes of coercion and extortion was discussed at length by this Court in *Scheidler v. National Organization For Women, Inc.*, 537 U.S. 393 (2003) (*Scheidler II*). The Court observed that the definition of extortion under Hobbs Act derived in large part from New York's Field Code, which recognized extortion as a species of larceny that involved both the deprivation of property from the victim and the acquiring of the property by the defendant or another. In *Scheidler II*, this Court pointed out that eliminating the requirement that property be obtained from the victim not only was in conflict with the express requirement of the Hobbs Act, it also had the effect of eliminating the recognized distinction between extortion and the separate crime of coercion, which the Court observed "involves the use of force or threat of force to restrict another's freedom of action". *Scheidler v. National Organization For Women, Inc.*, 537 U.S. 393,406 (2003) Extortion, on the other hand involves the obtaining, from another, of something of value that can be exercised, transferred or sold. *Id.* at 405

In the instant case, the Second Circuit has profoundly deviated from the holding of *Scheidler II* and has created a new and different definition of

extortion that effectively transforms the result of any coercive act into property, eliminating any distinction between the crime of extortion, which Congress has chosen to criminalize, and the crime of coercion, which Congress has not. Over the objection of Mr. Sekhar that the indictment was being constructively amended, the District Court charged the jury that intangible property included "the right to make various business decisions free from outside pressure". According to the Court of Appeals:

> "Here, as the district court concluded, Sekhar attempted to deprive the General Counsel of his right to make a recommendation consistent with his legal judgment and attempted to exercise that right by forcing the General Counsel to make a recommendation determined by *Sekhar*." (Pet. App. 12a)

By recasting the subject of the indictment as the General Counsel's "right to make a recommendation", the circuit court is able to construct a situation where the act of purportedly obtaining the General Counsel's right to make a recommendation, operates to simultaneously exercise that right.

Under the Second Circuit's analysis, Mr. Sekhar attempted to deprive the General Counsel's "property right" to make a recommendation in one matter, the FA Technology Ventures investment and at the same time attempted to "exercise" the right by controlling it, thereby obtaining the right for himself.

However, the exercise of a right contemplates more than a mere direction to do an act. The

exercise of a property right contemplates the ability to enforce the intended result. The evidence at trial does not support a finding that Mr. Sekhar attempted to exercise any identifiable, legally recognized property right in the possession of the General Counsel that could be enforced. A property right gets "exercised" in the legal sense. Options, for instance, are exercised, thereby creating rights that can be enforced in law or equity. Here, the General Counsel's "right to make a recommendation" does not get exercised by the General Counsel in the manner of an option or other legally enforceable rights. Rather, the Second Circuit substitutes the property term of art, "exercise", for the more mundane and legally less significant "do the act of" in order to have the effect of the General Counsel's decision making be deemed property.

By substituting the "right to make recommendations" for "recommendation", the *Scheidler II* conception of property as something capable of being "sold, transferred, or exercised" becomes meaningless, because any coercive act can be mutated into property by dissecting it into two parts: the obtaining of someone's right to do something (or not do something) and the simultaneous exercise of that right by dictating the act to be done. A recommendation by its very nature is non-binding and unenforceable and would no vest no right in the person on whose behalf the recommendation was made. It can't be sold transferred or exercised. The District Court and subsequently the Second Circuit, improperly and effectively amended the indictment to charge that the property sought was not a recommendation, but rather the General Counsel's right to recommend,

and thus were able to find a simultaneous attempt to exercise the right by virtue of the coercive act. Under the Second Circuit's construction, the coerced act is deemed to be both the property (property right) and the exercise thereof, potentially turning every coercion into extortion.

By attempting to "exercise" the General Counsel's right to recommend, Mr. Sekhar would not have, had he been successful, deprived the General Counsel of anything. Nor would he have acquired anything resembling property. If what Mr. Sekhar would have acquired had he been successful was the General Counsel's recommendation, he would have acquired nothing that could be sold, transferred or exercised in the legal sense. Under the Second Circuit's analysis, any attempt to coerce an individual to do an act, is an attempt to exercise a right; and as discussed *infra*, by the simple expedient of characterizing the act as "stock in trade", the right becomes a property right, that then becomes the subject of a Hobbs Act extortion charge.

B. By Holding That a Lawyer's Advice is "Stock in Trade," the Second Circuit Improperly Imbues Such Advice With the Characteristics of a Tangible Commodity that can be Bought, Sold, and Transferred, When in Reality What a Lawyer Provides is a Non-Transferable Intangible Service.

In order to find a property right in the General Counsel's right to make a recommendation, the Second Circuit cites to a number of cases that ostensibly stand for the proposition that an individual has a property right in making "business decisions" free from interference. See, *United States*

v. Vigil, 523 F.3d 1258, (10th Cir. 2008) *cert. denied* 555 U.S. 886 (2008) (public official forcing the victim to hire a specific employee and pay the employee a percentage of anticipated revenue from a contract as a condition of getting the contract), *United States v. Gotti*, 459 F.3d 296 (2d. Cir. 2006) *cert. denied* 551 U.S. 1144 (2007) (defendants required victim to install illegal gambling machines on the victim's business premises or pay defendants $1,000 per month); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969) *cert. denied* 397 U.S. 1021 (1970) (defendants obtained the victim's property right to solicit customer accounts). In reality, the subject of the indictment in the forgoing cases was a revenue stream - money - that was diverted from the victim to some other person.

This Court has never held that there exists an intangible property right to make "business decisions" free from interference. In *College Savings v. Florida Prepaid Postsecondary Education Expense Board*, 527 US 666 (1999), this Court held that the activity of conducting business is itself, not property. Indeed, in *Scheidler II*, this Court cited to case law decided by New York courts involving coercion aimed at businesses that was clearly understood to be coercion and not extortion, at the time Congress passed the Hobbs Act, which was based on New York law. See, *Scheidler v. National Organization For Women, Inc.*, 537 U.S. 393, 405-406 (2003); *People* v. *Ginsberg*, 262 N. Y. 556 (1933); *People* v. *Scotti*, 266 N. Y. 480 (1934); *People* v. *Kaplan*, 240 App. Div. 72 (1934)

Nevertheless, the Second Circuit, in finding an intangible property right in the General Counsel's right to make a recommendation held:

> "'The right to pursue a lawful business . . . has long been recognized as a property right . . . .' *Tropiano*, 418 F.2d at 1076. There is a property right to 'conduct a business free from threats,' *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999), abrogated in part on other grounds by *Scheidler II*, 537 U.S. at 403 n.8, and 'to make various business decisions . . . free from outside pressure,' *Gotti*, 459 F.3d at 327.
>
> "The General Counsel's job was to provide legal advice to the Comptroller. A 'lawyer's stock in trade is the sale of legal services.' *Massaro v. Chesley (In re San Juan Dupont Plaza Hotel Fire Litig.)*, 111 F.3d 220, 237 n.19 (1st Cir. 1997) (internal quotation marks omitted). What is sold is 'time and advice.' *United States v. Bertoli*, 994 F.2d 1002, 1023 (3d Cir. 1993) (internal quotation marks omitted). Accordingly, the General Counsel had a property right in rendering sound legal advice to the Comptroller and, specifically, to recommend--free from threats—whether the Comptroller should issue a Commitment for FA Tech III." (Pet. App. 8a-9a)

It is not without significance that the Second Circuit characterized the General Counsel's work as

a "job" and not a business. The General Counsel was not engaged in the practice of law as a business enterprise. Yet the circuit court finds that the General Counsel had a property right to make a recommendation because, hypothetically, "lawyer's stock in trade is the sale of legal services".

In support of such a proposition the Court of Appeals cites to *Massaro v. Chesley (In re San Juan Dupont Plaza Hotel Fire Litig.)*, 111 F.3d 220, 237 n.19 (1st Cir. 1997) a mass tort lawsuit wherein the issue on appeal was the appropriateness of certain costs charged to litigants in the action. In a footnote, the court references and quotes from an American Bar Association Committee on Ethics and Professional Responsibility Formal Opinion 93-379 that directs as follows:

> "On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services."

In reality, a lawyer in practice provides legal services for which he is usually compensated on an hourly basis, the same as a plumber, an auto mechanic or psychiatrist. A lawyer has no stock in trade in the sense that his legal advice is a commodity that can be sold and re-sold in the open market. A lawyer provides services. Moreover, the

General Counsel was not engaged in the practice of law as a business, selling his legal services to paying clients. The hypothetical lawyer that the Circuit Court alludes to in its decision does not exist in this case. It is an abstraction, a device, that the Court of Appeals employs to transmogrify a "recommendation" into a "right to make a recommendation" and then into a *property* right; the "right to make a recommendation free from threats". Under the Second Circuit's analysis, coercing a prostitute into touching someone in a sexual manner is extortion because the prostitute's stock in trade is the sale of sexual favors. Coercing a doorman to open a door is extortion because a doorman has a right to conduct his business free from threats.

In contradistinction to the Second Circuit's misuse of the stock in trade analogy in the case of a lawyer who is a salaried employee of a state agency is this Court's use of the analogy in connection with confidential news gathered for publication. In *International News Service v. Associated Press*, 248 U.S. 215 (1918) this Court held that news gathered for publication constituted property. This Court stated:

> "[N]ews matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise." *International News Service v. Associated Press*, 248 U.S. 215, 236 (1918).

News gathered for publication is a commodity to be sold on the open market. In *Carpenter v. United States*, 484 U.S. 19 (1987) this Court held that confidential business information of a newspaper is property under the mail and wire fraud statutes, to which the newspaper had the exclusive right to the use of. The "right" of the General Counsel to make a recommendation, on the other hand, bears no resemblance to any recognized intangible property right. It is not a debt, chose in action, contract, copyright, trademark, patent, or intellectual property. It cannot be sold, transferred or exercised in a legal sense. The Second Circuit's holding that the General Counsel's right to make a recommendation in a single instance is a property right deriving from a purported right to make business decisions free from interference and the notion that any lawyer's advice is his stock in trade, is an outrageous expansion of the concept of intangible property.

C. The Second Circuit's Holding That Under the Hobbs Act, the Thing Sought to be Obtained From the Victim Need Not be a Source of Wealth for the Victim and Therefore Not be Property in the Victim's Hands is Contrary to the Holdings of this Court and the Second Circuit's Own Precedents.

Perhaps even more astonishing and outrageous is the Second Circuit's holding that the subject matter of the extortion attempt need not be a source of wealth for the target of the extortion. To anyone with a modicum criminal law experience, the pronouncement of the court is profoundly disturbing.

Extortion is a species of larceny. Larceny involves the deprivation of property from the victim and the appropriation of the same property by the defendant, either to himself or to a third person. The property of the victim moves from the victim's possession into the possession of another, unchanged in its nature, character or identity. In *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969) *cert. denied* 397 U.S. 1021 (1970) the Second Circuit defined intangible property as something that is a source or element of wealth. In *Tropiano*, the property right obtained from the victim by the defendants was the right to solicit business in a particular area which was undoubtedly a source of wealth for the victim. The non-competition agreement extorted from the victim by the defendants became an asset of the defendants' business that was valuated when the business was sold.

Yet in the instant case the circuit court held that the thing which is the subject of an extortion attempt need not be property (a source or element of wealth) in the hands of the victim. Under the Second Circuit's analysis, something that has no economic or pecuniary value to the victim and therefore, is not property, becomes property when it is obtained by the defendant because, it could trigger other events that may result in a financial benefit to the defendant.

The Second Circuit's holding that the thing sought to be obtained need not be property in the victim's hands is in direct conflict with the clear language of the Hobbs Act which defines extortion as "the obtaining of ***property from another*** with his consent", induced by threats. Extortion is a form of

larceny. The victim is forced by threats to part with property that belongs to him and transfer it to someone else. Nothing of the sort occurred in the instant case.

The decision of the Court below redefines extortion in the instant case as the obtaining of something that is not property, from another, with his consent, induced by threats in order to profit, regardless of the source of the profit. In *Cleveland v. United States*, 531 U.S. 12 (2000) this Court rejected the argument that the federal mail fraud statute, which criminalized false statements made in furtherance of a scheme to defraud money or property, reached false statements made to state regulators in an application for a state permit to operate video poker machines. This Court reasoned that in order to be convicted under the mail fraud statute, a defendant must obtain something that is "property" in the hands of the victim. To the extent that a license or permit to operate the machines was not property in the state's hands, the defendant could not be guilty of obtaining property from the victim, even though the license once obtained could be deemed property in the defendant's hands. The same analysis should apply to the Hobbs Act.

As this Court observed in *Cleveland*, state laws covering false statements in licensing application applied to defendant. Equating the issuance of a license or permit with a deprivation of property would effect a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress, and would subject a wide range of conduct traditionally regulated by state and local authorities to federal mail fraud prosecution.

The same can be said of the Second Circuit's interpretation of the Hobbs Act. A state law attempted coercion case, like the instant case, can suddenly become a Hobbs Act attempted extortion case if the coercion is done "in order to profit".

D. The Second Circuit's Formulation of Property Under the Hobbs Act as Anything That Could be of Speculative Benefit to the Defendant, and Which Need Not Derive Directly From The Thing Obtained From the Victim, is in Conflict with a Decision of the Ninth Circuit Court of Appeals and can be Traced to a Misunderstanding by the Second Circuit of this Court's Decision in United States v. Green, 350 US 415 (1956).

Under the Second Circuit's analysis in the instant case, there is no requirement that the thing obtained be a source of wealth, that is, property, for the victim. Indeed, under the Second Circuit's analysis, the Hobbs Act does not even require that the thing obtained be a source or element of wealth for the defendant, because, according to the Court of Appeals:

> "'"[t]he concept of property . . . does not depend upon a direct benefit being conferred on the person who obtains the property.'" *Gotti*, 459 F.3d at 320 (quoting *Tropiano*, 418 F.2d at 1075-76). An extortionist does not necessarily profit by exercising the rights thus obtained; it is enough that 'defendants exercise the rights in question in order to profit themselves.' Id. at 326."

The phrase "does not depend upon a direct benefit being conferred on the person who obtains the property" derives from this Court's decision in *United States v. Green*, 350 U.S. 415 (1956) a case cited by the *Tropiano* court.

However, this Court did not opine that "the concept of property" does not depend on a direct benefit being conferred on the person who obtains the property. Rather, this Court pointed out that a Hobbs Act extortion does not require that the individual who threatens the victim actually receive the property that the victim is deprived of. In *Green*, the defendants were union officials who used threats of violence to coerce contractors into hiring superfluous laborers. The victims were contractors who were deprived of money paid to these laborers. The defendants argued that because they did not receive the money, they were not guilty of extortion.

The district court granted the defendant's motion to arrest judgment because it believed that the statute required that the person making the threats actually receive the property from the victim. Appeal was taken directly to this Court which reversed the district court. In addressing the erroneous conclusion that the district court reached regarding the necessity of the defendants receiving the property, this Court observed that "extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property. *Green*, at 420. To the extent that this Court has previously pointed out that the Hobbs Act was based on New York's extortion law, the absence of a requirement that the defendant receive the property is consistent with New York law.

See, New York Penal Law §155.05(2)(e) (McKinney 1965).

The Second Circuit's pronouncement that "concept of property" does not require a direct benefit to the defendant radically changes the definition of intangible property. Heretofore, intangible property was recognized as something that could be considered a source or element of wealth. If it is a source of wealth or an element of wealth it is of direct benefit to the one who possesses or obtains it. Under the Second Circuit's rule, "intangible property" does not have to be a source or element of wealth for either the victim or the defendant and need not be something of direct benefit to the defendant once obtained by him. All that matters is that the defendant does some coercive act "in order to profit".

In the instant case, the Second Circuit finds that the defendant sought to control the General Counsel's recommendation making ability in a single instance. According to this Court's decision in *Scheidler II*, in order to be convicted of a Hobbs Act extortion, the defendant must pursue something of value that that can be exercised, transferred or sold. The recommendation making ability of the General Counsel, if it were possible to obtain such a thing, once obtained could not be sold, transferred, or exercised. It would not be a source of wealth to the defendant, a non-lawyer. Under the Second Circuit's analysis, because the "concept of property" does not depend upon a direct benefit being conferred on the person who obtains the property, any indirect or speculative benefit that can be deemed of value to

the defendant is property: According to the Second Circuit:

> "[A] positive recommendation by the General Counsel would have increased the chances the Comptroller would issue a Commitment; a Commitment was necessary for FA Tech III to receive a Pension Fund investment; and an investment would have resulted in management fees for FA Technology and profit for Sekhar, as a managing partner. And the evidence showed that Sekhar understood that line of causation. Accordingly, there was sufficient evidence to conclude that Sekhar, in order to profit, attempted to exercise the General Counsel's property right to make recommendations. The government was not required to prove that Sekhar would actually have been enriched had he succeeded in exercising that right. Opportunities have value." (Pet. App. 13a)

This same analysis was specifically rejected by the Ninth Circuit in *United States v. McFall*, 558 F.3d 951 (9th Cir. 2009) where it was held that obtaining a speculative advantage by coercing a competitor from bidding a job is not extortion under the Hobbs Act. The Ninth Circuit stated:

> "The district court concluded that McFall's 'improper attempt to secure a business advantage' satisfied the Hobbs Act's obtaining element, but this

> formulation fails to account for *Scheidler's* principal point: To violate the Hobbs Act, an alleged extortionist must actually appropriate (or attempt to appropriate) the victim's property such that it can be exercised, transferred or sold. Id. at 405. It is not enough to gain some speculative benefit by hindering a competitor." *McFall*, 558 F.3d 951, 957 (9th Cir. 2009)

In the instant case, Mr. Sekhar did not attempt to obtain anything of value that could be exercised, transferred, or sold. The recommendation of the General Counsel, had it been made, would not have resulted in Mr. Sekhar obtaining something that could be exercised, transferred, or sold. All that Mr. Sekhar would have acquired was some speculative benefit.

In *United States v. Cain*, 671 F.3d 271 (2d Cir.2012) *cert. denied sub nom* __ U.S.__, 132 S.Ct. 1872, 182 L.Ed.2d 655 (2012) the Second Circuit affirmed the defendant's extortion conviction under the Hobbs Act where the defendant used a pattern of violence and intimidation to force business competitors to abandon their businesses, ostensibly in order to gain business for himself. In a footnote, the Second Circuit acknowledged its disagreement with the Ninth Circuit's analysis in *McFall*, which the Second Circuit stated was based upon "our own reading of *Scheidler* and our own precedents in *Tropiano* and *Gotti*." *Cain*, 671 F.3d 271, 283 n.4 (2d Cir. 2012) The decision of the Second Circuit in the instant case specifically references its disagreement with the Ninth Circuit's holding in *McFall* that " [i]t

is not enough to gain some speculative benefit by hindering a competitor". (Pet. App. 13a) The clear import of the Second Circuit's rulings is that a defendant need only seek to obtain a "speculative benefit" in order to be convicted of extortion under the Hobbs Act. Thus, the Second Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter: Whether the obtaining of something that is of no direct benefit to the defendant constitutes the obtaining of property under the Hobbs Act.

E. The Question Presented is Important.

The Second Circuit has generated a body of case law that effectively overrules *Scheidler II* and its requirement that under the Hobbs Act, the Government must prove that the defendant deprived the victim of property and acquired the same property for himself or another. Under the Second Circuit's reading of *Scheidler II*, a defendant need not deprive the victim of anything of value and need not obtain anything that is of direct benefit to the defendant. Rather, the defendant need only coerce, with the motive to profit. The Second Circuit's reading of *Scheidler II* eliminates the obtaining of property as an element of the offense by redefining property as the right to make a particular decision and obtaining as the forced "exercise' of that right.

Under the Second Circuit's reading of *Scheidler II*, nearly any state law coercion case can easily be transformed in to a Hobbs Act extortion by characterizing the decision involved in the coercion as a business decision; even when the victim is not actually engaged in business. This is clearly at

variance with this Court's pronouncement in *Scheidler II* that: "If the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law's coverage must come from Congress, and not from the courts". *Scheidler v. National Organization for Women*, 537 U.S. 393, 409 (2003) In the instant case, the Second Circuit has effected just such a significant and unwarranted expansion of the coverage of the Hobbs Act. Mr. Sekhar was defending himself in state court against a charge of attempted coercion when the Federal Government adopted the case and in essence, manufactured a Federal offense by fundamentally changing the definition of property.

In *Scheidler II*, this Court declined to address the issue of what types of intangible interests can constitute property under the Hobbs Act. The instant case presents an opportunity for this Court to address this important question of federal law that was left undecided in *Scheidler II*. Similarly, the instant case affords this Court the address a conflict in decisions by two Courts of Appeals on an important issue of federal law: Whether the obtaining of something that is of no direct benefit to the defendant constitutes the obtaining of property under the Hobbs Act.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SECOND CIRCUIT COURT OF APPEALS AFFIRMING JUDGEMENT OF CONVICTION

United States Court of Appeals,
Second Circuit.
UNITED STATES of America, Appellee,
v.
Giridhar C. SEKHAR, Defendant–Appellant.
Docket No. 11–4298.
Argued: April 16, 2012.
Decided: June 26, 2012.

Before: JACOBS, Chief Judge, B.D. PARKER and HALL, Circuit Judges.

DENNIS JACOBS, Chief Judge:

Giridhar Sekhar was convicted following a jury trial in the United States District Court for the Northern District of New York (Thomas J. McAvoy, Judge) of [i] attempted extortion of the General Counsel of the New York State Comptroller's Office in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and [ii] interstate transmission of extortionate threats in violation of 18 U.S.C. § 875(d). Sekhar had threatened to disclose gossip that the General Counsel was conducting an office affair unless the General Counsel recanted a recommendation to the State Comptroller to reject a proposal by Sekhar's company. On appeal, Sekhar contends that his conduct did not come within the statutory definition of extortion because he did not "attempt to obtain property" from the General Counsel. See Scheidler v.

Nat'l Org. for Women, Inc.(Scheidler II), 537 U.S. 393, 409, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003) (interpreting 18 U.S.C. *438 § 1951(b)(2)). Sekhar argues that [1] the General Counsel's right to make recommendations was not a property right, and [2] he did not attempt to appropriate or exercise that right. We affirm.

BACKGROUND

Investment Process. The Common Retirement Fund ("Pension Fund" or "Fund") is the employee pension fund for the State of New York and various of its local governments. The State Comptroller is the sole trustee and has final approval over all Fund investments.

If the Comptroller approves an investment, he issues a Commitment. Fund investments are sometimes contingent on a company's attracting other investors, and a Commitment assists that process by signaling the backing of the Pension Fund. But a Commitment does not bind the Fund to invest; for that, the parties must execute and close on a limited partnership agreement.

Proposed Investment with FA Technology. In 2008, the Comptroller issued a Commitment for a $35 million investment in a fund managed by FA Technology Ventures ("FA Technology") known as "FA Tech II." The investment never closed. In October 2009, the Comptroller's Office considered another $35 million investment in two FA Technology funds, known collectively as "FA Tech III." Based on the proposed terms, FA Technology would earn nearly $7.6 million in

management fees over ten years, and could earn more depending on how the investment performed.

In April 2009, the Comptroller's Office had prohibited investments marketed by placement agents. Although FA Technology did not use a placement agent for FA Tech III, it had used one for FA Tech II, and the Comptroller's Office questioned the FA Tech III investment on that ground because the investment was "essentially the same" as FA Tech II.

While the General Counsel was considering the issue, he was advised by the Office of the New York Attorney General that it was investigating the placement agent involved in FA Tech II and that the Pension Fund should avoid association with that agent. The General Counsel's internal memo recommended that, "[b]ased on information provided by the Office of the Attorney General ..., it would be prudent, from a legal perspective, to avoid moving forward" with the FA Tech III investment and warned that the Pension Fund and the Comptroller's Office could be "in a vulnerable situation if the investment were made and a report or other finding of wrongdoing was subsequently issued by the [Office of the Attorney General]." The Comptroller, so advised, decided on November 13 not to approve the investment.

The First Deputy Comptroller conveyed the decision to George Hulecki, a managing partner of FA Technology. Hulecki had previously been informed of the General Counsel's opposition to the investment and of rumors that he was having an extramarital affair.

Sekhar's Conduct. On November 17, the General Counsel received an anonymous e-mail to his work account requesting a personal e-mail address to report "a serious ethical issue." He advised the e-mailer to contact the Inspector General, but also provided a personal address. The e-mailer replied to the personal address accusing the General Counsel of "blackball[ing] a recommendation on a fund," and threatening that if, by November 20, he did not tell the Comptroller that he had a "change of heart" and "recommend moving forward with this fund," the e-mailer would disclose that the General Counsel was having an office affair to the General Counsel's wife, as well as to the Comptroller, the Attorney General, the press, and others.

That night, another e-mail warned the General Counsel that he had "36 hours left ... [t]o make the wrong right." The next day, a similar e-mail arrived, as well as an e-mail attaching a draft letter to the Attorney General disclosing the alleged affair.

On the advice of law enforcement, the General Counsel asked the e-mailer for more time.

On Monday, November 23, the e-mailer assured the General Counsel that he would "never hear about this again" if he could "get this fixed by Wednesday." On Tuesday, December 1, the e-mailer asked the General Counsel what he thought about Tiger Woods: "[W]ho would have thought that a woman could get that upset ... and over what?" (ellipses in original).

The FBI traced some of the e-mails to the Brookline, Massachusetts home of Sekhar, a

managing partner of FA Technology, and executed a search warrant. Sekhar admitted to sending the e-mails, and forensics confirmed Sekhar's computer as the source.

Procedural History. The indictment alleged that Sekhar wrongfully attempted to obtain the General Counsel's recommendation to approve the Commitment, the Comptroller's approval of the Commitment, and the Commitment itself. Sekhar was charged with one count of attempted extortion under the Hobbs Act, 18 U.S.C. § 1951(a), and six counts of interstate transmission of extortionate threats, id. § 875(d). Sekhar moved pro se to dismiss the indictment on the ground (inter alia) that it failed to state an offense, see Fed.R.Crim.P. 12(b)(3)(B), because a recommendation is not property, an approval is not property, and the indictment did not allege that Sekhar threatened a person with power to issue the Commitment.

In denying the motion, the court ruled that "the General Counsel's right to make professional decisions without outside pressure is an intangible property right" and that the government need only prove that Sekhar "believed that the General Counsel's recommendation was the determining factor in obtaining the Commitment."

Sekhar, defending pro se, was convicted on the extortion count and on five of the six counts of interstate transmission of extortionate threats.[1] For each count, the jury indicated on a special verdict form that Sekhar attempted to extort the General

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1 Sekhar was acquitted on the count based on the December 1 "Tiger Woods" email.

Counsel's recommendation to approve the Commitment.

Sekhar, with counsel, moved for a judgment of acquittal or a new trial, based (inter alia) on the sufficiency of the evidence. See Fed.R.Crim.P. 29(c), 33(a). The court ruled that there was sufficient evidence that: Sekhar attempted to exercise control over the General Counsel's right to make recommendations; Sekhar believed that this exercise would result in a Commitment; and a Commitment would benefit Sekhar financially. Sekhar was sentenced to fifteen months' incarceration on each count, to be served concurrently.

DISCUSSION

On appeal, Sekhar contends that the indictment failed to state an offense and that the evidence was insufficient to sustain the conviction. For both contentions, Sekhar's argument is the same: His conduct, as alleged in the indictment and proven at trial, did not come within the statutory definition of extortion because he did not "attempt to obtain property" from the General Counsel. See Scheidler II, 537 U.S. at 409, 123 S.Ct. 1057(interpreting 18 U.S.C. §1951(b)(2)). The standard of review for both contentions is de novo. United States v. Gotti, 459 F.3d 296, 320 (2d Cir.2006) ("[W]e evaluate the legal issue[ ] of whether the indictment properly charged Hobbs Act extortion ... under a de novo standard."); United States v. Madori, 419 F.3d 159, 166 (2d Cir.2005) ("We review de novo a challenge to the sufficiency of evidence and affirm if the evidence, when viewed in its totality and in the light most favorable to the government, would permit any rational jury to find the essential elements of the

crime beyond a reasonable doubt." (internal quotation marks omitted)). Accordingly, we analyze both contentions together.[2]

The Hobbs Act subjects to criminal liability "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a). "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Id. §1951(b)(2). The parties agree that this definition also applies to § 875(d), which subjects to criminal liability "[w]hoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee." See also United States v. Jackson, 180 F.3d 55, 70 (2d Cir.1999) ("Given Congress's contemporaneous consideration of the predecessors of § 875(d) and the Hobbs Act, ... we infer that Congress's concept of extortion was the same with respect to both statutes.").

The element of "obtaining ... property" entails a two-part inquiry: "whether the defendant is (1)

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2 The Court has sometimes reviewed arguments similar to Sekhar's as challenging the sufficiency of the evidence, see *United States v. Cain*, 671 F.3d 271, 277 (2d Cir.), cert. denied *sub nom., Soha v. United States*, —— U.S. ——, 132 S.Ct. 1872, 182 L.Ed.2d 655 (2012), and sometimes as challenging the indictment, see *United States v. Coppola*, 671 F.3d 220, 233 (2d Cir.), *reh'g denied*, No. 10–0065–cr (2d Cir. May 14, 2012); *Gotti*, 459 F.3d at 320.

alleged to have carried out (or, in the case of attempted extortion, attempted to carry out) the deprivation of a property right from another, with (2) the intent to exercise, sell, transfer, or take some other analogous action with respect to that right." Gotti, 459 F.3d at 324 (citing Scheidler II).

I

"The concept of property under the Hobbs Act ... is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered as a source or element of wealth...." United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir.1969) (citations omitted); accord Gotti, 459 F.3d at 323.

"The right to pursue a lawful business ... has long been recognized as a property right...." Tropiano, 418 F.2d at 1076. There is a property right to "conduct a business free from threats," United States v. Arena, 180 F.3d 380, 394 (2d Cir.1999), abrogated in part on other grounds by Scheidler II, 537 U.S. at 403 n. 8, 123 S.Ct. 1057, and "to make various business decisions ... free from outside pressure," Gotti, 459 F.3d at 327.

The General Counsel's job was to provide legal advice to the Comptroller. A "lawyer's stock in trade is the sale of legal services." Massaro v. Chesley (In re San Juan Dupont Plaza Hotel Fire Litig.), 111 F.3d 220, 237 n. 19 (1st Cir.1997) (internal quotation marks omitted). What is sold is "time and advice." United States v. Bertoli, 994 F.2d 1002, 1023 (3d Cir.1993) (internal quotation marks omitted). Accordingly, the General Counsel had a property right in rendering sound legal advice to the

Comptroller and, specifically, to recommend—free from threats—whether the Comptroller should issue a Commitment for FA Tech III.[3]

Sekhar argues that the General Counsel's recommendation to approve the Commitment—which the jury found was the object of the attempted extortion—was not a property right enjoyed by the General Counsel because it was not, for the General Counsel, a "source or element of wealth." See Tropiano, 418 F.2d at 1075. According to Sekhar, the government had to show that the General Counsel derived wealth from his ability to make the recommendation or that he would have suffered monetarily had Sekhar succeeded in forcing him to change his recommendation.

The value and worth of a lawyer's services may be said generally to depend on freedom from conflict, including a conflict created by personal blackmail. Accordingly, the General Counsel's ability to give legal advice free from threats—and, specifically, to make a recommendation on FA Tech III—can be seen as a "source or element of wealth" for the General Counsel. In any event, as the district court observed, a property right need not be a source of wealth to the target of the extortion.

In Gotti, the Court held that the defendants—members and associates of the Gambino Crime Family—deprived union members of their rights under the Labor–Management Reporting and

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3 The government has not argued, and we need not consider, whether the state and local employees whose money was invested in the Pension Fund had a property right to have the General Counsel make recommendations in the best interest of the Fund.

Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 501(a), "to free speech[,] ... democratic participation in union affairs [, and] ... loyal representation by their officers, agents, and other representatives." 459 F.3d at 325; accord Coppola, 671 F.3d at 234–36; see also United States v. Bellomo, 176 F.3d 580, 592–93 (2d Cir.1999) ("The right of the members of a union to democratic participation in a union election is property...."). In considering another count, the Court held that the defendants deprived healthcare plan participants of their right to have the plan's "trustees and fiduciaries discharge their duties in [the plan's] best interest." Gotti, 459 F.3d at 326. The Court did not analyze whether these rights were a "source or element of wealth" for the targets of the extortion. Instead, as discussed in Part II, the Court focused on the value of the rights to the defendant extortionists.[4]

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4 Sekhar cites *Town of W. Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir.1990), for the proposition that "the term 'property' cannot plausibly be construed to encompass altered official conduct." In *West Hartford*, the Court held that antiabortion protesters did not engage in extortion by (*inter alia*) resisting arrest and refusing to identify themselves to police: While these actions caused the town to expend additional resources, "[v]irtually any conduct that elicits a governmental response will require activity by one or more salaried governmental employees." *Id.* Mere "governmental response to unlawful acts is not 'property' within the meaning of the Hobbs Act." *Arena*, 180 F.3d at 393 (citing *W. Hartford*, 915 F.2d at 101–02). In *West Hartford*, unlike the present case, the governmental response was an exercise of the police power, which did not entail a channeling of value or advantage to the benefit of a defendant.

II

"[T]he extortion provision of the Hobbs Act ... require[s] not only the *442 deprivation but also the acquisition of property." Scheidler II, 537 U.S. at 404, 123 S.Ct. 1057. The question becomes "whether the defendants ... 'pursued [or] received something of value from [victims] that they could exercise, transfer, or sell.' " Gotti, 459 F.3d at 323 (brackets in original) (quoting Scheidler II, 537 U.S. at 405, 123 S.Ct. 1057). The defendants in Scheidler II, anti-abortion protesters who aimed to shut down clinics, " 'may have deprived or sought to deprive [the clinics] of their alleged property right of exclusive control of their business assets,' " but " 'there was no basis upon which to find that [the protesters] committed extortion under the Hobbs Act' " because the protesters " 'did not obtain or attempt to obtain property from [the clinics].' " Id. at 322–23 (quoting Scheidler II, 537 U.S. at 405, 409, 123 S.Ct. 1057).

The protesters "would have satisfied the Scheidler II Court's definition of 'obtaining' " had they "sought to take further action after having deprived the clinics of their right to conduct their business as they wished—by, for example, forcing the clinic staff to provide different types of services." Id. at 324. In such an event, "the victim is ordered to exercise his or her rights in accordance with the extortionist's wishes, such that the extortionist is essentially controlling the exercise of those rights." Id. at 324 n. 9.

Accordingly, in Gotti, the Court held that the defendants, by controlling the decisions of union officials, "caused the relinquishment of the union members' LMRDA rights ... in order to exercise those

rights for themselves." Id. at 325; accord Coppola, 671 F.3d at 234–38. Addressing another count, the Gotti Court held that the defendants, by dictating the healthcare plan that union trustees selected, deprived the union members of their rights to have the trustees act as fiduciaries and "exercised the rights ... in order to profit themselves." 459 F.3d at 326; see also Cain, 671 F.3d at 282 ("[W]hether the property that is the subject of the extortion is valuable in the hands of the defendant ... will rarely be a problem in cases ... in which the defendant seeks to exploit the very intangible right that he extracts from the victim.").

Here, as the district court concluded, Sekhar attempted to deprive the General Counsel of his right to make a recommendation consistent with his legal judgment and attempted to exercise that right by forcing the General Counsel to make a recommendation determined by Sekhar.

As Sekhar points out, a positive recommendation from the General Counsel would not have guaranteed a Commitment, and a Commitment would not have guaranteed an investment. But " '[t]he concept of property ... does not depend upon a direct benefit being conferred on the person who obtains the property.' " Gotti, 459 F.3d at 320 (quoting Tropiano, 418 F.2d at 1075–76). An extortionist does not necessarily profit by exercising the rights thus obtained; it is enough that "defendants exercise[ ] the rights in question in order to profit themselves." Id. at 326 (emphasis added).

The defendant in Cain, who used threats and violence to drive his competitors from the market, argued that the government "introduced no evidence

that through [his] coercive conduct [he] obtained specific tree service jobs or a quantifiable portion of the tree-service market." 671 F.3d at 279. The Court held that the defendant had committed extortion because his "purpose in using violence against his victims was to acquire the market share held by [his competitors] and to exploit it for his own enrichment." Id. at 283. The Court expressed disagreement with the Ninth Circuit's holding in United States v. McFall, 558 F.3d 951, 957 (9th Cir.2009), that "[i]t is not enough to gain some speculative benefit by hindering a competitor." 671 F.3d at 283 n. 4.

Here, the evidence showed that a positive recommendation by the General Counsel would have increased the chances the Comptroller would issue a Commitment; a Commitment was necessary for FA Tech III to receive a Pension Fund investment; and an investment would have resulted in management fees for FA Technology and profit for Sekhar, as a managing partner. And the evidence showed that Sekhar understood that line of causation. Accordingly, there was sufficient evidence to conclude that Sekhar, in order to profit, attempted to exercise the General Counsel's property right to make recommendations. The government was not required to prove that Sekhar would actually have been enriched had he succeeded in exercising that right. Opportunities have value.

CONCLUSION

For the foregoing reasons, we affirm the district court's judgment of conviction.

APPENDIX B

OPINION OF THE DISTRICT COURT DENYING PETITIONER'S MOTION TO DISMISS THE INDICTMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. **1:10-cr-573**

GIRIDHAR SEKHAR,
Defendant.

THOMAS J. McAVOY,
Senior United States District Judge

DECISION & ORDER

I. INTRODUCTION

Defendant Giridhar Sekhar was indicted on one count of extortion, in violation of 18 U.S.C. § 1951(a), and six counts of interstate transmission of an extortionate threat, in violation of 18 U.S.C. § 875(d). Defendant has filed an omnibus motion that is opposed by the Government. The Court will address the arguments raised in the motion *seriatim*.

II. BACKGROUND – INDICTMENT

The following facts are taken from the Indictment.

The New York State Common Retirement Fund held assets in trust for public employees. The New York State Comptroller, as the Fund's sole trustee and manager, decided whether to commit proposed investments of the New York State Common Retirement Fund's assets. Commitment of these assets for investment purposes generated, among other things, management fees and a percentage of profits earned for the entities investing the assets. In making the decision whether and where to commit Common Retirement Fund's assets, the Comptroller relied on his staff in the Office of the Comptroller, including, among others, his General Counsel (the "General Counsel").

In October 2009, the New York State Comptroller and his staff, including the General Counsel, were considering whether the Comptroller should commit to invest $35 million of Common Retirement Fund assets in funds managed by FA Technology Ventures Corporation5 (the "Commitment"). Defendant was the managing partner of FA Technology Ventures Corp. If the Comptroller had made the Commitment, then FA Technology Ventures Corp, either directly or through one of its funds, would have earned management fees and a percentage of profits generated.

On October 26, 2009, the General Counsel recommended that the Commitment not be approved. In November 2009, the Comptroller or his staff decided not to approve the Commitment, and the

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5 FA Technology Ventures Corp. was a venture capital and private equity investment company with offices in Boston, Massachusetts and Albany, New York.

Comptroller's staff informally advised FA Technology Ventures Corp. of this decision.

Count One of the Indictment alleges:

> From on or about November 17, 2009 and continuing through on or about December 1, 2009, in the State and Northern District of New York and elsewhere, the defendant, GIRIDHAR C. SEKHAR, did affect and attempt to affect commerce by extortion, that is by attempting to obtain property from another with his consent induced by the wrongful use of fear and threatened fear, to wit, the defendant did attempt to obtain the Commitment, the Comptroller's approval of the Commitment, and the General Counsel's recommendation to approve the Commitment, with the General Counsel's consent, induced by threatening to disclose the General Counsel's alleged extramarital affair. All in violation of Title 18, United States Code, Section 1951(a).

Counts **Two through Seven** allege that the defendant, GIRIDHAR C. SEKHAR, knowingly and with the intent to extort from any person, firm, association, or corporation a thing of value, transmitted in interstate commerce a communication containing a threat to injure the reputation of the addressee, to wit, the defendant, knowingly and with the intent to extort

(1) from the Comptroller (a) the Commitment, (b) approval of the Commitment, and (c) the General Counsel's recommendation to approve the Commitment, and (2) from the General Counsel his recommendation to approve the Commitment, transmitted electronic mail messages to the General Counsel using the electronic mail address nyethics@yahoo.com threatening to injure the General Counsel's reputation by disclosing the General Counsel's alleged extramarital affair, and those electronic mail messages traveled from, through, and to the following locations:

Count	Date	From	Through To
Two	11/18/09	Jersey City, NJ	Albany, NY
Three	11/18/09	Brookline, MA	Albany, NY
Four	11/19/09	Brookline, MA	Albany, NY
Five	11/19/09	Jersey City, NJ	Albany, NY
Six	11/23/09	Jersey City, NJ	Albany, NY
Seven	12/1/09	Brookline, MA	Albany, NY

All in violation of Title 18, United States Code, Section 875(d). Indictment, ¶8

III. DISCUSSION

a. Dismissal- Facial Insufficiency of the Indictment

Defendant moves to dismiss the Indictment pursuant to Fed. Rules of Crim. Proc. 12(b)(3)(B) alleging that the Indictment is facially insufficient. In this regard, Defendant argues that

> "the definition of extortion under the Hobbs Act and 875(d) requires that the property obtained be money, property, or rights that are capable of being sold, transferred, or exercised. The indictment identifies three items – (1) a "Commitment," (2) "approval of the Commitment", and (3) a "recommendation to approve the Commitment" that purport to be the subject of extortion. However, none of these items is cognizable as extortable property. The indictment does not charge a crime and does not track the language of the statute, as it contemplates a threat directed at person X ([General Counsel] Bierman) that results in the supposed obtaining of the property of person Y ([Comptroller] DiNapoli)."

Def. MOL pp. 1-2.

"[A]n indictment is sufficient if it first contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an

acquittal or conviction in bar of future prosecutions for the same offense." *United States v. LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002)(citation omitted). The Second Circuit has "consistently upheld indictments that 'do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.'" *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999) (quoting *United States v. Tramunti*, 513 F.2d 1087, 1113 (2d Cir. 1975)). In addressing a motion to dismiss, "the allegations of the indictment must be taken as true." *Boyce Motor Lines v. U.S.*, 342 U.S. 337, 343 n.16 (1952).

1. Hobbs Act

The Hobbs Act seeks to punish "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . ." 18 U.S.C. § 1951(a). "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened . . . fear." 18 U.S.C. § 1951(b)(2). The dispute in this case, as in many other Hobbs Act cases, concerns application of the phrase "obtaining of property from another."

"The concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered as a source or element of wealth and does not depend upon a direct benefit being conferred upon the person who obtains the property . . . ." *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969). It is a long held principle that

intangible property rights can qualify as extortable property under the Hobbs Act. *United States v. Gotti*, 459 F.3d 296, 323 & 326 (2d Cir. 2006). Protected intangible rights include the right to contract with a party of one's choosing, the right to make various business decisions free from outside pressure, and the right to decide with whom to work. See *Gotti*, 459 F.3d at 326-27; see also *United States v. Vigil*, 523 F.3d 1258, 1264 (10th Cir. 2008) (protected intangible rights include the "right to make various business decisions free from outside pressure, and the right to decide with whom to work"); *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986)(The property element of a Hobbs Act conviction requires "no more than the [victim's] right to make his businessdecisions free of threats and coercion, or other intangible rights.").

> The mere existence of a property interest, however, is not sufficient to establish a Hobbs Act violation. The Supreme Court has "construed the extortion provision of the Hobbs Act . . . to require not only the deprivation but also the acquisition of property." [*Scheidler v. Nat'l Org. for Women*, Inc.,537 U.S. 393, 404 (2003) ("Scheidler II")]. In other words, to be guilty of attempted extortion, it is not enough that [the defendant] attempted to deprive [the victim] of a property right; [the defendant] must have also attempted to "obtain" that property. Id. The Supreme Court in *Scheidler II* went on to hold that to "obtain" property under the Hobbs Act requires a defendant to have "pursued [ ]or received 'something of

> value from' [the victim] that they could exercise, transfer or sell." Id. at 405 (quoting *United States v. Nardello*, 393 U.S. 286, 290, 89 S. Ct. 534, 21 L.Ed.2d 487 (1969)).See *United States v. Welch*, 327 F.3d 1081, 1108 n. 27 (10th Cir. 2003)(explaining that the Supreme Court's holding in *Scheidler II*, requiring that a defendant "obtain" property to sustain an extortion conviction, distinguishes the Hobbs Act from other fraud statutes).

United States v. Vigil, 478 F. Supp.2d 1285, 1312 (D.N.M. 2007).

In *Gotti*, "the Second Circuit articulated a two-pronged inquiry for determining whether the obtaining-of-property element had been met for the purposes of establishing extortion of intangible property under the Hobbs Act." Id. at 1313. In this regard, the Second Circuit held that "in evaluating . . . whether [an extortion count] adequately alleges the 'obtaining of property' for purposes of the Hobbs Act's definition of extortion – the key inquiry is whether the defendant . . . [1] in the case of attempted extortion, attempted to carry out[] the deprivation of a property right from another, with (2) the intent to exercise, sell, transfer, or take some other analogous action with respect to that right." *Gotti*, 459 F.3d at 324. "[T]he [Supreme Court's] emphasis [in *Schiedler II*] on the possibility of exercising, transferring, or selling the property [is] a concern with the extortionist's intent." *Id.* at 323 (emphasis in original).

The Second Circuit in *Gotti* provided examples of how an extortion victim's property interest might be exercised, transferred, or sold.

> In the first example, the victim is ordered to exercise his or her rights in accordance with the extortionist's wishes, such that the extortionist is essentially controlling the exercise of those rights. In the second example, the victim is ordered to transfer his or her rights over to the extortionist so that the extortionist can simply exercise those rights himself or herself. (A closely related variant would be where the extortionist orders the victim to transfer the rights to a third party of the extortionist's choosing.) In the third example, the victim's right is sold by the extortionist to a third party of the extortionist's choosing. The precise demarcation between an exercise and a transfer may certainly be subject to debate. Because the critical question is simply whether the defendant sought to exercise, transfer, or sell the rights at issue, however, we are less concerned with line-drawing between those terms than with the unifying principle for the "exercise, transfer, or sale" framework: the defendant's intent to do something affirmative with respect to the property right.

Gotti, 459 F.3d at 324 n. 9.

"The Gotti rule is that if a defendant interferes with a person's intangible rights for the sake of

enrichment, then this constitutes both a deprivation and an acquisition of the defendant's property." *United States v. Hui Chen*, 350 Fed. Appx. 520, 522, 2009 WL 3429757, at * 2 (2d Cir. Oct. 27, 2009). "A motive ultimately to profit by cashing out the value of the property right will generally serve as powerful evidence that the defendant's goal was to obtain the right for himself, rather than merely to deprive the victim of that right." *Gotti*, 459 F.3d at 324-325.

The Indictment alleges that FA Technology Ventures Corp. was advised that the Commitment would not be approved based on the General Counsel's October 26, 2009 recommendation. Defendant thereafter allegedly attempted to alter this determination "with the General Counsel's consent" by threatening to expose an alleged extramarital affair by the Comptroller's General Counsel. Indictment § 6. Although Count 1 alleges that Defendant attempted to gain only the General Counsel's consent relative to the Commitment, the Hobbs Act does not require that the person extorted own or have the power to single handedly control the property that is the subject of the extortion. Rather, "the key inquiry for the jury in an attempted extortion charge is whether the defendant[]thought [the victim]" had this control. *United States v. Ivezaj*, 568 F.3d 88, 95 (2d Cir. 2009)(interpreting New York's extortion statute which was a model for the Hobbs Act). Assuming, *arguendo*, that the General Counsel did not actually control the Commitment by his recommendation, this factual impossibility does not provide a defense to an attempted extortion if the Government establishes that Defendant believed that the General Counsel's recommendation was the

determining factor in obtaining the Commitment. *Ivezaj*, 568 F.3d at 95.

Moreover, the General Counsel's right to make professional decisions without outside pressure is an intangible property right that, in this case, is inextricably related to the investment of the Common Retirement Fund's assets. The Indictment sufficiently alleges facts indicating that Defendant intended to obtain the General Counsel's recommendation to approve the Commitment so that Defendant could obtain the monetary benefit of the $35 million investment into his company. These allegations are similar to the first example given by the Second Circuit in *Gotti*: "[T]he victim is ordered to exercise his or her rights in accordance with the extortionist's wishes, such that the extortionist is essentially controlling the exercise of those rights." Further, the Indictment sufficiently alleges that the property right in question "related in some way to an alienable economic or contractual right that carries forward into the future" that the Defendant intended to be exercised in a manner that would enrich him. *United States v. Warme*, 2010 WL 125846, * 4 (W.D.N.Y. Jan. 7, 2010). That is, the Indictment alleges that Defendant attempted to extort the General Counsel into recommending the Commitment so that Defendant's company would financially benefit. This satisfies the obtaining-of-property element of a Hobbs Act claim. See id. ("As the United States Supreme Court put it, alleged extortioners have to have 'received something of value . . . that they could exercise, transfer, or sell.'")(quoting *Scheidler II*, 537 U.S. at 405).

The Indictment sufficiently alleges that Defendant interfered with the General Counsel's intangible right for the sake of his own enrichment, thus constituting both a deprivation and an attempt to acquire property under the Hobbs Act. Defendant's motion to dismiss Count 1 is denied.

2. Section 875(d)

Section 875(d) seeks to punish "[w]hoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee . . . ." 18 U.S.C. § 875(d). This statute does not define the term "extort," but the Second Circuit has determined that an interpretation of the term is similar to the statutory definition of "extortion" in the Hobbs Act. See *United States v.Jackson*, 180 F.3d 55, 70 (2d Cir. 1999). Thus, "where a threat of harm to a person's reputation seeks money or property to which the threatener does not have, and cannot reasonably believe [he] has, a claim of right, or where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful and its transmission in interstate commerce is prohibited by § 875(d)." Id. at 71.

The Indictment alleges that on several dates Defendant threatened harm to the General Counsel's reputation in Defendant's attempt to obtain money or property to which he did not have a claim of right, and did so by transmissions of the threats in interstate commerce. That is, the Defendant attempted to obtain the General Counsel's recommendation to approve the Commitment, which,

as indicated above, is an intangible property right that Defendant sought to exercise for his own enrichment, by threatening via emails sent to the General Counsel to damage the General Counsel's reputation by publicly exposing his alleged extra-marital affair. These allegations are sufficient to assert § 875(d) violations. Accordingly, Defendant's motion to dismiss Count 2 is denied.

b. Dismissal – Multiplicity

Next, Defendant moves to Dismiss Counts 2 through 7, asserting that "[t]he seven 875(d) counts are multiplicitous, in that they charge separate crimes for messages sent to the same victims related to the same alleged property and thus are part of the same alleged extortion transaction." Def. MOL p. 2.

"An indictment is multiplicitous when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed." *United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999). "The primary problem is that the jury can convict on both counts, resulting in two punishments for the same crime in violation of the Double Jeopardy Clause of the Fifth Amendment." *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004)(citing *Chacko*, 169 F.3d at 145).

"When, as here, the same statutory violation is charged [multiple times], the question is whether the facts underlying each count were intended by Congress to constitute separate 'units' of prosecution." Id. (citing *Bell v. United States*, 349 U.S. 81, 83-84 (1955)). "It is not the conduct that underlies the offense that matters for multiplicity analysis, but rather 'the 'offense'--in the legal sense,

as defined by Congress.'" *Id.* (quoting *Chacko*, 169 F.3d at 146).

> If Congress leaves a statute ambiguous as to the proper unit of prosecution, "the ambiguity should be resolved in favor of lenity." Bell, 349 U.S. at 83, 75 S. Ct. 620. Under the rule of lenity, courts may not "turn[ ] a single transaction into multiple offenses . . . ." *Id.* at 84, 75 S. Ct. 620.

United States v. Kerley, 544 F.3d 172, 178 (2d Cir. 2008).

Section 875(d) provides that "[w]hoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, **transmits** in interstate commerce **any communication** containing any threat to injure the property or reputation of another [shall be guilty of a crime.]" 18 U.S.C. § 875(d)(emphasis added). There is no ambiguity in the statute that, in enacting § 875(d), Congress intended each threatening communication transmitted in interstate commerce with the intent to extort money or other thing of value to be a seprate offense. Thus, each seprate threat placed into interstate commerce is a unit of prosecution. See *United States v. Frazer*, 391 F.3d 866, 870 (7th Cir.2004)("Under [18 U.S.C. §§ 844(e), 875(c), and 876(c)], the unit of prosecution is the telephone call or letter; each call or letter is indictable separately as a different 'threat.'")(citing *United States v. Corum*, 362 F.3d 489 (8th Cir. 2004); *United States v. Nedd*, 262 F.3d 85, 88 (1st Cir. 2001); *United States v. Thomas*, 155 F.3d 833 (7th Cir. 1998)). Accordingly, Defendant's motion on this ground is denied.

c. Dismissal - Vindictive Prosecution and Prosecutorial Misconduct

Defendant moves under Rule 12(b)(3)(A) to dismiss the Indictment for the reasons of vindictive prosecution and prosecutorial misconduct, or, in the alternative, to compel discovery and conduct a hearing on the matter.

1. Relevant Background

Before being charged in federal court, Defendant was charged with crimes in New York state court arising out the same factual scenario that underlies the instant action. Although first charged by a felony complaint with Attempted Grand Larceny in the First Degree, on February 2, 2010 a grand jury in Albany County returned a two-count indictment charging Mr. Sekhar with one count of Attempted Coercion in the First Degree and one count of Bribery in the Third Degree. By Decision and Order dated June 30, 2010, the New York State Supreme Court, Albany County ("the State Court") dismissed the bribery charge, finding the People's theory of "conferring a benefit" by refraining from injuring the victim's reputation to be legally unsound. The State Court also scheduled a hearing on Defendant's motions seeking to suppress statements and physical evidence. The suppression hearing was scheduled for August 6, 2010.

On July 14, 2010, First Assistant United States Attorney for the Northern District of New York Grant C. Jaquith met with representatives of the Albany County District Attorney's Office to discuss Defendant's conduct. Jaquith Aff., 3. Jaquith agreed that his office "would seek to obtain and

review information regarding the defendant's conduct and consider whether federal charges were appropriate." Id. On July 22, 2010, Jaquith and Assistant United States Attorney Tina Sciocchetti went to the Albany County District Attorney's Office and received additional information concerning the case. Id. 4; see also Sciocchetti Aff. ¶ 2. Jaquith "determined that the reported conduct by Giridhar Sekhar warranted federal prosecution if there was admissible evidence sufficient to prove it beyond a reasonable doubt, and directed AUSA Sciocchetti to obtain and evaluate the results of the investigation." Jaquith Aff., ¶ 4. Jaquith further attests that "in early August" he authorized Sciocchetti to present a criminal complaint charging Giridhar Sekhar with a federal crime. Id. ¶ 5[6]. His authorization was based upon the decision of the United States.Attorney for the Northern District of New York, "in consultation with [Jaquith] and the leaders of our Criminal Division," that prosecution was warranted to vindicate the federal interest in addressing the criminal conduct and was not in any way related to any exercise by Giridhar Sekhar of his legal rights." Id. ¶¶ 5-6.

According to an affidavit from Defendant's state court attorney, Paul A. Clyne, Esq.,

> on or about August 4, 2010, [Clyne] received a telephone call from Assistant United States Attorney Tina Sciocchetti,

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6 Jaquith later learned, however, that a criminal complaint was not filed in early August "because defense counsel requested that we first afford him an opportunity to speak with representatives of the U. S. Attorney's Office regarding our intentions." Jaquith Aff. ¶ 5

> who indicated that she was with Assistant District Attorney Eric Galarneau, and that she was considering adopting the case against Mr. Sekhar as a federal prosecution. According toMs. Sciocchetti, she was aware that the matter was scheduled for a suppression hearing on August 6, and that unless [Clyne] agreed to adjourn the hearing, she would be "forced" to filed a felony complaint in federal court. . [Clyne] agreed to adjourn the hearing and expressed to Ms. Sciocchetti in a subsequent telephone conversation that [he] felt that her conduct was inappropriate.

Clyne Aff. ¶ 3.

AUSA Sciocchetti has attested to a somewhat similar rendition of the August 4, 2010 telephone conversations, indicating that while she was at the Albany District Attorney's Office she called Clyne and told him that she had been "presented with sufficient evidence to file a complaint against Mr. Sekhar for sending a threatening interstate communication" but wanted to review more information before making a final decision on whether to file a complaint. Sciocchetti Aff. ¶ 3. Because she was aware that a motions hearing was scheduled for August 6, 2010, Sciocchetti advised Clyne that she

> would not like to see government witnesses unnecessarily testify in the state evidentiary hearing. From the Assistant District Attorney's perspective,

> [she] stated, there was no need for a motions hearing if the state case were going to be dismissed in lieu of federal prosecution. [Sciocchetti] further stated that [she] could file the criminal complaint immediately, but would afford the defense an opportunity to discuss the matter in advance of federal grand jury action if that were Mr. Clyne's preference. However, [Sciocchetti] asked in return for that opportunity, that the defense agree to a postponement of the state hearing. Mr. Clyne complained that [she] was "coercing" his client into giving up his hearing in the state court. [Sciocchetti] clarified that that was not [her] intent and that [she] was calling to inform him of the criminal complaint, but would not file the complaint if he wished to meet with [her] about the potential federal charges before [she] filed it. He stated that he needed to consult with his client and would call [Sciocchetti] back.

Sciocchetti Aff. ¶ 3.

Sciocchetti further attests that Clyne called her back later that day and stated that his client had decided that he wanted an opportunity for his counsel to talk with Sciocchetti before she filed charges in federal court, and for that reason, Clyne "would agree to postpone the suppression hearing in state court, although he would only do so if the speedy trial time were charged to the state." Id. ¶ 4. Clyne complained that he thought that what Sciocchetti was doing was "highly inappropriate," so

Sciocchetti told Clyne that "if his client believed that he was being threatened and was receiving no benefit in postponing his hearing, he should proceed with the hearing and [she] would proceed as [she] had planned." Id. Sciocchetti "reiterated that the U.S. Attorney's Office had received sufficient information to charge his client and we were delaying that decision to give him the opportunity to talk to us. [Sciocchetti] also told Mr. Clyne again that [she] did not want a suppression hearing to take place in a case that [she] would likely inherit and the state had no interest in holding a suppression hearing in a case that likely was to be dismissed in lieu of federal prosecution." Id. Sciocchetti also "reminded" Clyne "that his client was not giving up his right to his non-dispositive suppression hearing, he was simply delaying it" because "his client would get a suppression hearing" in federal court. Id. According to Sciocchetti, she

> told Mr. Clyne that his client could oppose the state's motion to delay the hearing, and that his client should not agree to postpone the hearing if he believed that [Sciocchetti] was acting unfairly or unethically. Mr. Clyne said that he did not want [her] to seek a complaint and would agree to put off the hearing. . . .

Sciocchetti Aff. ¶ 4.

Thereafter, Defendant retained Attorney William Dreyer to represent him in regard to any federal charges. From August through October, AUSA Sciocchetti engaged in plea negotiations with Attorney Dreyer. While the negotiations between

Dryer and Sciocchetti proceeded, the state suppression motions proceeded to a hearing that was held on several dates. See Clyne Aff. ¶ 4.

Although the suppression issues were never resolved in state court (discussed infra), Attorney Clyne and Defendant contend that the testimony adduced from the witnesses was adverse to the People's interests on those motions. See Clyne Aff. ¶¶ 4-6 Mr. Clyne further attests: "During the several dates when the suppression hearing was held, agents of the FBI were in attendance at the hearing, as well as Assistant United States Attorney Sciocchetti on October 1, 2010. AUSA Sciocchetti conferred regularly with the Assistant District Attorney throughout the proceeding in which the People's main witness [testified] relating to statements" and during which the Defendant testified. Id. ¶ 6.

Defendant asserts that on October 2, 2010, AUSA Sciocchetti contacted Attorney Dreyer and offered a plea bargain to dispose of both the state and federal charges. Defendant did not accept the offer, choosing instead to proceed with the suppression hearing in state court. Defendant maintains that ADA Galarneau then began requesting adjournments of the suppression hearing, purportedly as a stalling tactic to avoid a determination on the suppression motions. After an adjournment was granted, the State Court denied a second adjournment request and maintained October 22, 2010 as the next hearing date.

AUSA Sciocchetti acknowledges that she "discussed a possible delay in the state court suppression hearing with Mr. Dreyer on one occasion

on October 12, 2010." Sciocchetti Aff. ¶ 6. In this regard AUSA Sciocchetti asserts that she had

> extended a pre-indictment plea offer to Mr. Dreyer, and he called to ask some additional questions about the plea offer. He asked whether it would dispose of both the state and federal cases against Sekhar, and [Sciocchetti] stated that it would. In light of that, [Sciocchetti] asked Mr. Dreyer for a decision regarding the plea before October 22 - the date on which the state hearing was scheduled to continue - so that the state could dismiss its case in advance of the hearing. [Sciocchetti] told Mr. Dreyer that if he required more time to discuss the plea with his client, he could postpone the state court hearing further. [Sciocchetti] advised Assistant District Attorney Galarneau of the status of [her] discussions with Mr. Dreyer. Mr. Dreyer later called [Sciocchetti] to tell [her] that Mr. Clyne and his client did not wish to postpone the state hearing and that they considered the state court to be an entirely independent proceeding.

Id.

On October 22, 2010, ADA Galarneau made an oral motion to dismiss the indictment in the interest of justice. Clyne Aff. ¶ 6. ADA Galarneau advised the State Court that the Government was filing a federal complaint but that he did not have the complaint with him. Defendant opposed the motion and requested that the State Court render a decision on the suppression motions. The State Court declined to

rule on any of the pending motions and advised the ADA to file a formal motion before the Court would consider dismissal, and adjourned the matter to October 27, 2010.

On October 22, 2010, AUSA Sciocchetti filed a complaint charging Defendant with one count of Interstate Transmission of an Extortionate Threat, in violation of 18 U.S.C. § 875(d). Sciocchetti Aff. ¶ 8. On October 27, 2010, the State Court granted the People's motion to dismiss the state Indictment despite Defendant's objection. Defendant was subsequently indicted on the Hobbs Act and six § 875(d) charges referenced above.

2. Sham Hearing

Defendant argues that his constitutional rights were violated because the state court suppression hearing "was a sham, with the joint prosecutors coordinating their actions to intimidate/coerce the Defendant . . . .and deprive him of suppression ruling that would have been binding in federal court via collateral estoppel . . . ." Def. Reply MOL p.5.

As Defendant correctly acknowledges, under the "dual sovereignty doctrine," successive state and federal prosecutions for the same conduct ordinarily do not run afoul of the Double Jeopardy Clause of the Fifth Amendment. See *United States v. Aboumoussallem*, 726 F.2d 906, 909 (2d Cir. 1984). "A narrow exception to the dual sovereignty doctrine, carved out in *Bartkus v. Illinois*, [359 U.S. 121, 79 S. Ct. 676, 3 L.Ed.2d 684 (1959)], bars a second prosecution where one prosecuting sovereign can be said to be acting as a tool of the other, or where the

second prosecution amounts to a sham and a cover for the first." *Id.* at 910 (internal citation and quotation marks omitted).

Defendant has no Double Jeopardy Clause claim, however, because jeopardy never attached in the state proceeding with regard to the charges in issue in the instant case. See *United States v. Dionisio*, 503 F.3d 78, 85 (2d Cir. 2007)(Jeopardy attaches when "there has been a fact-based resolution of elements of the offense charged as aresult of a process in which the defendant risked conviction."). Moreover, even if jeopardy did attach, Defendant would have no Double Jeopardy Clause claim because

> [c]ooperation between federal and state authorities . . . does not of itself establish an exception to the dual sovereignty doctrine. See *Bartkus*, 359 U.S. at 122-24, 79 S. Ct. 676 (finding no exception to the dual sovereignty doctrine where an FBI agent had turned over evidence to state prosecutors); *Aboumoussallem*, 726 F. 2d at 910 (stating that joint investigation of criminal activity does not establish an exception to the dual sovereignty doctrine); *United States v. Russotti*, 717 F. 2d 27, 31 (2d Cir. 1983) (noting that cooperation between federal and state authorities is to be lauded and does not alone establish that one is the "tool" of the other). We have also previously observed, in the related context of assessing when principles of collateral estoppel bar the federal government from

> using evidence suppressed in a state proceeding, that the federal government is not obligated to refrain from "vindicat[ing] its interests and values" by pursuing a prosecution simply because a state prosecution is initiated first. *United States v. Davis*, 906 F. 2d 829, 832 (2d Cir. 1990).

United States v. Vanhoesen, 366 Fed. Appx. 264, 267, 2010 WL 580017, at *2 (2d Cir.Feb. 18, 2010)(unpublished).

The facts here are insufficient to find that the state and federal prosecutors improperly colluded on the prosecution of Defendant. Although there was some coordination of the efforts of the prosecutions from the two sovereignties, even under Defendant's version of the events there is insufficient evidence that the state prosecution, commenced before the federal prosecution, was merely a sham or tool for the federal prosecution. As the facts indicate, the federal prosecutor continued to ask that the state suppression hearing be adjourned to allow the federal prosecution to take over, so there is no basis to conclude that the federal prosecutor sought to use the state action to gain a tactical advantage over Defendant. Further, there is insufficient evidence that the federal prosecution is a sham or being used as a tool for the state prosecution which has now been dismissed. Accordingly, any claim for dismissal under the Double Jeopardy Clause is denied.

3. Vindictive Prosecution

Defendant argues that "the federal prosecution and the up-charge to the Hobbs Act were

initiated in response to the Defendant's exercise of his constitutional and statutory rights" to a suppression hearing and therefore constitute vindictive prosecution in violation of Defendant's rights to constitutional due process. Def. Reply MOL p. 5."[T]he decision as to whether to prosecute generally rests within the broad discretion of the prosecutor." *United States v. White*, 972 F.2d 16, 18 (2d Cir. 1992). "This broad discretion is proper because 'the decision to prosecute is particularly ill-suited to judicial review." *United States v. Almaeh*, 341 F. 3d 167, 173 (2d Cir. 2003)(quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). "Of course, this discretion cannot be exercised in extra-legal fashion, and it is properly 'subject to constitutional constraints.'" Id. (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

It is a violation of constitutional due process "[t]o punish a person because he has done what the law plainly allows him to do." *United States v. Goodwin*, 457 U.S. 368, 372 (1982); see *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort). Instituting a federal criminal prosecution for a vindictive reason, such as because a person chooses to exercise a constitutional right as opposed to for the legitimate reason of vindicating federal interests, constitutes a due process violation. See *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969).

"A vindictive motive for a prosecution will be found where there is direct evidence of actual vindictiveness, or a rebuttable presumption of a

vindictive motive may arise under certain circumstances." *United States v. Koh*, 199 F.3d 632, 639 (2d Cir. 1999). Defendant argues that there is a presumption of vindictiveness arising from the timing of the federal prosecution and the statement by AUSA Sciocchetti that she would be forced to file a criminal complaint if Defendant did not agree to adjourn his suppression hearing.

> To establish a presumption of prosecutorial vindictiveness, the defendant must show that the circumstances of a case pose a realistic likelihood of such vindictiveness. The circumstances must present a realistic likelihood of vindictiveness that would be applicable in all cases, and any such presumption may be overcome by objective evidence justifying the prosecutor's action.

United States v. Sanders, 211 F.3d 711, 717 (2d Cir. 2000)(interior citations and quotation marks omitted).

"[T]he presumption of prosecutorial vindictiveness generally does not arise . . . in the subsequent shift from a state to a federal prosecution." Id. (citing *United States v. Johnson*, 171 F.3d 139, 140 (2d Cir. 1999)(per curiam) (The "shift from state to federal jurisdiction is commonplace" and, therefore, not subject to a presumption of prosecutorial vindictiveness)); see also *United States v. Harris*, 87 Fed. Appx. 782, 784 (2d Cir. 2004)("[Defendant's] argument that a presumption of vindictiveness was established by the procedural history of the state court proceedings [in which Defendant prevailed on his state court appeal]

is unavailing."); *United States v. Ng*, 699 F.2d 63, 68 (2d Cir. 1983) ("[T]he fact that the prosecutions of the defendants are by two different sovereigns, each acting independently under its own laws and in its own interest without any control of or by the other, renders inapplicable the concept of prosecutorial vindictiveness.").

Assuming, *arguendo*, that the circumstances of this case pose a realistic likelihood of vindictiveness, the presumption is overcome by the objective evidence. This evidence establishes that the United States Attorney for the Northern District of New York made the decision to prosecute Defendant in early August, Jaquith Aff., ¶ 5, which is at or around the time that Defendant was scheduled to begin, yet agreed to adjourn, his state suppression hearing. The decision was based upon the federal prosecutor's review of the evidence (which review began before AUSA Sciocchetti contacted Defendant's state court attorney on August 4, 2010), and the desire to vindicate federal interests. See Jaquith Aff. ¶¶ 2-6.

Even accepting Defendant's attorney's rendition of the August 4, 2010 telephone call when AUSA Sciocchetti purportedly told Mr. Clyne that the U.S. Attorney's Office "was considering adopting the case against [Defendant] as a federal prosecution," and that she would be "forced to file[] a felony complaint in federal court," unless he "agreed to adjourn the suppression hearing," Clyne Aff. ¶ 3, there is no evidence that AUSA Sciocchetti threatened prosecution unless Defendant gave up his right to a hearing.7 Further, if the federal prosecutor

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7 There is no rebuttal to AUSA Sciocchetti's attestation that she advised defense counsel that, if Defendant agreed to an

had not made the decision to prosecute Defendant before Defendant determined to proceed with his state court suppression hearing, then there would have been little to negotiate between AUSA Sciocchetti and Attorney Dryer between August 4 and mid-October 2010, and there would have been no basis for AUSA Sciocchetti's offer of a global plea agreement on October 12, 2010.

Because the decision to charge Defendant was made before Defendant determined to proceed with his state suppression hearing, there is no correlation between Defendant's decision to exercise his constitutional right to a suppression hearing and the charging decision. Moreover, there is no indicia of vindictiveness in the "up charging" that occurred in the Indictment. It is common practice in cases commenced by way of felony criminal complaint that subsequent indictments c ntain more, and perhaps more serious, charges. The charging of less or less serious charges in a criminal complaint allows the parties greater latitude to arrive at a plea bargain (as was attempted in this case) before the case is subjected to the more demanding process of grand jury indictment and eventual trial. In addition, as more fully explained above, there is a legally justifiable basis alleged in the Indictment for all of the charges brought against Defendant. Therefore, there is no merit to the argument that a "realistic likelihood" of vindictiveness arises from being "up charged" by the Indictment simply because it was

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adjournment and the federal prosecutor adopted the case, Defendant would have the same right to request a suppression hearing in federal court as he did in state court.

returned after Defendant decided to proceed with the state suppression hearing. See *Goodwin*, 457 U.S. at 384 ("[A] mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule."); *Sanders*, 211 F. 3d at 719 ("[T[he defendants cannot claim that the circumstances surrounding their case pose a 'realistic likelihood' of vindictiveness. Such a presumption is not warranted merely because the government commenced criminal proceedings against somebody who challenged the findings of a government agency.").

Accordingly, to prevail on this claim, Defendant must establish actual vindictiveness. "To establish an actual vindictive motive, a defendant must prove objectively that the prosecutor's charging decision was a direct and unjustifiable penalty that resulted solely from the defendant's exercise of a protected legal right. *Sanders*, 211 F.3d at 716-17 (interior citations and quotation marks omitted). Thus, "[i]n order to prevail on his claim, [Defendant] must show that (1) the prosecutor harbored genuine animus toward the defendant, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a 'stalking horse,' and (2) he would not have been prosecuted except for the animus." *Koh*, 199 F.3d at 640 (interior quotation marks and citation omitted).

Defendant does not assert, nor is there any evidence to support, that the federal prosecutor was prevailed upon to bring the charges "by another with animus such that the prosecutor could be considered a 'stalking horse.'" Defendant also presents insufficient evidence to support his contention that the federal prosecution was commenced, or "up

charged" through the Indictment, due to animus from Defendant's choice to exercise his rights in the state suppression hearing. As indicated above, the federal prosecutor's decision to charge defendant was made at or around the time that Defendant agreed to adjourn his state suppression hearing. Further, in keeping with the practice in most cases commenced by criminal complaints, the subsequent indictment contained more, but legally proper, charges against Defendant. The Court finds no evidence of any genuine animus motivating the prosecution and, therefore, this portion of the motion is denied.

Because Defendant has failed to provide "some evidence tending to show the existence of the essential elements of the defense," *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir.1974), he has not met the rigorous policy-based standard imposed on motions seeking discovery on a vindictive prosecution defense. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996)(A rigorous standard is imposed because "[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."). Accordingly, the motion for discovery on this defense is denied. Also, because Defendant has failed to demonstrate some evidence tending to show the existence of the essential elements of the defense, and because of the public policy limiting exploration into the prosecutor's decision making process, *Armstrong*, 517 U.S. at 465, the motion for a hearing on this basis is denied.

d. Suppression of Evidence - Brookline Warrant

Defendant moves to suppress evidence seized from a December 3, 2010 search warrant executed at Defendant's home in Brookline, Massachusetts (the "Brookline Warrant"). Defendant contends that (1) the affidavit in support of the Brookline Warrant contained false statements, (2) the affidavit failed to establish probable cause, and (3) the warrant was overly broad.

1. Background

The Brookline Warrant, issued on December 3, 2009 by Assistant Clerk Magistrate Edward Savage of the Brookline District Court,[8] specifically incorporates the 15-page supporting affidavit by

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8 Massachusetts law authorizes Assistant Clerk Magistrates to issue search warrants. See *Mass. Gen. Laws* ch. 218 §§ 33, 35; *Commonwealth v. Mendes*, 457 Mass. 805, 806-08 & fn. 4 (Mass. 2010)("On the basis of [Detective Sergeant Sean Balcom's] affidavit, an assistant clerk-magistrate of the Barnstable District Court issued the two requested search warrants on February 16, 2007. . . . Contrary to the positions taken by the defendant, as well as the Commonwealth, we hold that where the application is supported by probable cause, a District Court judge or magistrate may issue a search warrant authorizing a search for evidence at any specified location in the Commonwealth, regardless whether the criminal activity to which the warrant application pertains is located within or outside that court's territorial jurisdiction.")(citing R.G. Stearns, *Massachusetts Criminal Law: A District Court Prosecutor's Guide*, at 299 (29th ed. 2009)("Justices of the Superior and District Courts and clerk magistrates and assistant clerks of the District Courts have the authority to issue search warrants for any location within the territorial jurisdiction of the Commonwealth")).

Brookline Police Department Detective Matthew McDonnell. That affidavit describes the alleged extortionate activities in detail and attaches several of the e-mail messages believed to have been sent by Defendant to the General Counsel. In addition, the affidavit sets forth the text of the e-mail messages, summarizes evidence demonstrating that three of the e-mail messages were sent from an Internet Protocol address registered to Defendant at his home address, and provides evidence that the other e-mails were sent from an Internet Protocol address at FA Technology's parent corporation's headquarters in New Jersey. The affidavit explains that Defendant was a partner at FA Technology, that "the funds in question pertained to a twenty five million dollar investment" the General Counsel had objected to making to FA Technology just before the e-mails were sent, and that it was believed that the Defendant had been "using computers to transmit" the extortionate e-mails. The affidavit also indicates that, although Defendant did not work in the Comptroller's Office, the e-mails contained intimate information about the Comptroller's Office such as "details about the inner workings of the [Comptroller's Office], gossip relating to intra-office affairs, the first name of [the General Counsel's] wife, and information about the contents of a memorandum written by the General Counsel recommending that the Commitment not be approved, leading McDonnell to conclude that Defendant was acting in concert with others and may have been communicating with co-conspirators by computer, telephone, or cellular telephone. McDonnell opined that evidence of the extortion would be found at Defendant's residence. Because of

the small size and readily transferable nature of computer-related evidence such as flash drives, McDonnell believed that some evidence may be secreted on Defendant's person or in Defendant's vehicle (which was identified in the affidavit). McDonnell concluded:

> Based upon the above information, I respectfully submit that there is probable cause to believe that Giridhar Sekhar, a managing partner with [FA Technology Ventures Copr. ("FATV")], and others, are involved in an ongoing scheme to extort and bribe [the Office of the New York State Comptroller ("OSC")] Special Counsel Luke Bierman, as well as the attempt and conspiracy to do the same. I also submit that there is probable cause to believe that property may be found in or upon the above captioned residence within the Town of Brookline and within the described vehicle registered to Sekhar, to wit: property that is unlawfully possessed, and/or has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense against laws of this state (Conspiracy c. 274, s. 7 and Extortion, MGL c. 265, s. 25) as well as against the crimes of Bribery in violations of Article 200, Larceny (by extortion) in violation of Article 155, and the Attempt and Conspiracy to commit those crimes in violation of Article 105 and 110 all against the Penal Law of the State of New York; and/or constitutes evidence or

> tends to demonstrate that an offense was committed or that a particular person participated in the commission of a criminal offense.

Aff. pp. 12-13.

The warrant authorized officers to search Defendant's residence, person, and automobile for:

> (A) - Computer(s), laptop(s), computer systems, computer programs and data, central processing units, computer monitors, keyboards, mice, printers, modems, any other peripherals, instructional manuals, computer diskettes, compact disks, computer diskettes, digital video disks, flash drives and any other computer storage media in which such information may be stored;
>
> (B) - Recordings or listings of passwords or encryption keys designed to prevent access to such computer data, said recordings or listings being in a variety of forms, including, but not limited to: papers, cards or electronic data contained or stored on a computer's on computer diskettes, flash drives, or on any other computer storage media;
>
> (C) - All documents, data, e-mails, memos, correspondence, and notes which would identify the members of FATV, OSC and/or others that may have been involved in negotiations over the investment with FATV and their roles in the negotiation, or that would otherwise relate to said investment;

(D) - Any electronic device or other facility for the storage or processing of such data and/or records;

(E) - Written or printed records, notes, documents or other property, including cellular telephones, containing evidence of the aforesaid crimes and/or being instrumentalities thereof, or identifying potential co-conspirators;

(F) - Any other item, document, record, note, or other information indicating or depicting names and/or identities of co-conspirators.

On December 3, 2009, investigators from the Albany County District Attorney's Office and officers from the Brookline Police Department went to the vicinity of Defendant's residence. At about 8:20 p.m., the officers and investigators observed Defendant with his wife and children leaving the property in Defendant's vehicle. The vehicle was stopped and everyone returned to the residence. Upon executing the warrant, the police and investigators seized two computers and a piece of paper from Defendant's wallet that contained the handwritten names of the General Counsel and his wife, the General Counsel's children's names and schools, and an e-mail address and telephone numbers. See Govt. MOL, pp. 18 & 24, n. 14. According to Defendant, the police also seized Defendant's wedding ring (although not inventoried); tax files; banking records; corporate salary files; two backpacks full of papers, files, and books (although not inventoried); unspecified corporate documents; personal mail; a camera; Amazon Kindle electronic readers; personal financial receipts; building passes;

a printer; 176 CDs; a backup hard-disk; "and other items." Def. MOL p. 12. The Government asserts that it does not intend to offer at trial any of the personal items seized, and appears to assert that it intends to offer only the contents of the two computers (which themselves were subject to a seprate search warrant, discussed infra) and the handwritten note from Defendant's wallet. See Govt. MOL, pp. 18 & 24, n. 14.

2. False Statements - Request for Franks Hearing

Defendant requests a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed.2d 667 (1978), asserting that McDonnell's supporting affidavit contained deliberate falsehoods. In this regard, Defendant argues that the affidavit falsely alleges an extortion because the e-mails did not demand money and, therefore, there is no extortive demand for something of value such to charge extortion. Next, he argues that the affidavit falsely alleges a bribery because there are no facts supporting the bribery element that a thing of value was offered to entice the victim to act. Finally, Defendant argues that it was falsehood to allege that the crimes might have been a part of a conspiracy because a single person could have sent all the e-mails and could have known the intimate details of the Comptroller's Office.

In order to obtain a *Franks* hearing, defendant must make a "substantial preliminary showing" that "a deliberate falsehood or statement made with reckless disregard for the truth was included in the warrant affidavit", and that "the statement was necessary to the judge's finding" of probable cause.

United States v. Falso, 544 F.3d 110, 125 (2d Cir. 2008) (citing Franks). Defendant has failed to make this showing. His assertions of falsehoods concern interpretation of the law and his own interpretation of the reasonable inferences which could be drawn from the facts known to the police. None of these arguments constitute a "substantial preliminary showing" that "a deliberate falsehood or statement made with reckless disregard for the truth" was made in the affidavit. Rather, the arguments constitute debatable propositions of law or fact that can be drawn from the facts known to the police but which do not constitute deliberate or reckless falsehoods. Accordingly, the motion for a Franks hearing is denied.

3. Probable Cause

Defendant also asserts that the supporting affidavit failed to provide evidence establishing probable cause that a crime had been committed or that evidence of criminality could be found in the locations sought to be searched.

The Fourth Amendment prohibits "unreasonable searches and seizures," and requires that "no warrants shall issue, but upon probable cause, supported by Oath." U.S. Const. amend. IV. "Probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). "The task of the issuing .magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found

in a particular place." *Gates*, at 238. "[A] court reviewing a challenged warrant . . . 'must accord considerable deference to the probable cause determination of the issuing magistrate.'" *United States v. Clark*, --- F.3d ----, 2011 WL 781597, at * 3 (2d Cir. March 08, 2011)(quoting *Walczyk v. Rio*, 496 F.3d 139, 157 (2d Cir. 2007)). A probable cause determination should not be invalidated based upon a "hypertechnical" interpretation of the supporting affidavit. *United States v. Ventresca*, 380 U.S. 102, 109 (1965).

The facts alleged in McDonnell's supporting affidavit adequately provided probable cause for the reviewing magistrate to conclude that Defendant committed the acts of extortion and bribery by threatening to publically reveal the General Counsel's alleged extra-marital affair unless the General Counsel reversed his decision on the Commitment and convinced the Comptroller to approve it.9 The affidavit also provides probable cause to believe that evidence of the crimes could be found at Defendant's residence, on his person, and in his car. While a conclusion adverse to McDonnell's conclusions of probable cause could be drawn, the law does not require that the probable cause determination be based upon un-refutable facts or evidence showing guilt beyond a reasonable doubt. "[P]robable cause does not demand any showing that a good-faith belief be correct or more likely true than false. . . . It requires only such facts as make

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9 One of the e-mails suggested that the General Counsel meet with the Comptroller, explain a change in opinion relative to the recommendation, and encourage the Comptroller to approve the Commitment.

wrongdoing or the discovery of evidence thereof probable." *Walczyk*, 496 F.3d at 157 (internal quotation and citation omitted). This standard has been met with regard to the Brookline Warrant.

4. Overbreadth of Warrant

Defendant next argues that the Brookline Warrant is unconstitutionally broad on its face and, because the affidavit in support of the warrant is not attached to the warrant, gave officers unfettered discretion to search and seize Defendant's property.

"[T]he Fourth Amendment protects against 'wide-ranging exploratory searches' unsupported by probable cause, *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013, 94 L. Ed.2d 72 (1987), by mandating that a search warrant describe with particularity the place to be searched and the persons or things to be seized." *United States v. Rosa*, 626 F. 3d 56, 61 (2d Cir. 2010). "A warrant must be sufficiently specific to permit the rational exercise of judgment by the executing officers in selecting what items to seize." *United States v. Liu*, 239 F.3d 138, 140 (2d Cir. 2000)(internal quotation marks and alterations omitted). A related purpose of the particularity requirement of the Fourth Amendment is to provide necessary information to an individual whose property is being searched or seized to serve as a safeguard against general exploratory rummaging by the police. See *Groh v. Ramirez*, 540 U.S. 551, 559-561 (2004); *Katz v. United States*, 389 U.S. 347, 356 (1967). "The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Groh*, 540 U.S. at 557.

Although items and categories of items to be searched for and seized are identified in the warrant, the face of the warrant does not identify the crime or crimes believed to have been committed by Defendant and which formed the basis for the warrant. Thus, there is little on the face of the warrant that limits a search and seizure of any items falling within these categories. Other than paragraph (C) that references "the negotiations over the investment with FATV" with the Comptroller's office, the face of the warrant provides little if any judicial limit on the scope of the search or the items that could be seized. Therefore, the warrant is impermissibly broad. See *Rosa*, 626 F. 3d at 62 ("[T]he warrant directed officers to seize and search certain electronic devices, but provided them with no guidance as to the type of evidence sought . . . We therefore conclude that the warrant failed to describe with particularity the evidence sought and, more specifically, to link that evidence to the criminal activity supported by probable cause. As a result, the warrant violated the Fourth Amendment's proscription against general searches."); *United States v. Bianco*, 998 F. 2d 1112, 1116 (2d Cir. 1993)(noting that the subject warrant, when viewed by itself, was impermissibly broad because it described "neither the precise items to be seized nor the possible crimes involved"); *United States v. George*, 975 F. 2d 72, 76 (2d Cir. 1992) ("Mere reference to 'evidence' of ... general criminal activity provides no readily ascertainable guidelines for the executing officers as to what items to seize. . . . [A]uthorization to search for 'evidence of a crime,' that is to say, any crime, is so broad as to constitute a general warrant."); see also *United States v.*

Burgess, 576 F.3d 1078, 1091 (10th Cir. 2009) ("If the warrant is read to allow a search of all computer records without description or limitation it would not meet the Fourth Amendment's particularity requirement.").

A defect in the face of the warrant may be cured if the affidavit supporting the warrant is incorporated and attached to the warrant that is provided to the subject of the warrant. *Groh*, 540 U.S. at 557-58 ("We do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant."); *George*, 975 F.2d at 76 ("Resort to an affidavit to remedy a warrant's lack of particularity is only available when it is incorporated by reference in the warrant itself and attached to it."); see also *Rosa*, 626 F. 3d at 64 (Since Groh, "we may no longer rely on unincorporated, unattached supporting documents to cure an otherwise defective search warrant . . . . "). Here, the warrant incorporates by reference the supporting affidavit, but Defendant contends that (1) the affidavit was not attached to the warrant, (2) the affidavit was not present at the time of the search. The Government does not contest these points but asserts that suppression is not mandated because the officers' actions in seeking and executing the warrant were done in good faith.

As the Second Circuit explained in *Rosa*:

A violation of the Fourth Amendment does not necessarily result in the application of the exclusionary rule, however. "Indeed, exclusion has always been our last resort, not our first impulse." *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 700, 172 L. Ed.2d 496 (2009) (internal quotation marks omitted).

Application of the exclusionary rule depends on the "efficacy of the rule in deterring Fourth Amendment violations in the future" as well as a determination that "the benefits of deterrence . . . outweigh the costs." Id.; see also *United States v. Julius*, 610 F.3d 60, 66-67 (2d Cir.2010) (discussing *Herring*). Moreover, "[t]he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." *Herring*, 129 S. Ct. at 702. Thus, in deciding to suppress evidence, we look to whether "police conduct [is] sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.*; see also *United States v. Leon*, 468 U.S. 897, 911, 104 S. Ct. 3405, 82 L .Ed.2d 677 (1984) ("[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus."). "The pertinent analysis of deterrence and culpability is objective," and " 'our good-faith inquiry is confined to

> the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.' " *Herring*, 129 S. Ct. at 703 (quoting *Leon*, 468 U.S. at 922 n. 23, 104 S. Ct. 3405).

Rosa, 626 F. 3d at 64.

In assessing the officers' motivations in conducting the search, the Court may look to the supporting affidavit. See id. ("While we may no longer rely on unincorporated, unattached supporting documents to cure a constitutionally defective warrant, those documents are still relevant to our determination of whether the officers acted in good faith, because they contribute to our assessment of the officers' conduct in a particular case."). The supporting affidavit was very detailed and set forth probable cause to believe that Defendant was engaged in an extortionate attempt with others to obtain the benefit of a multi-million dollar investment from the Office of the New York State Comptroller. The affidavit which, unlike in *Rosa*, was incorporated by reference in the warrant, provided a good faith basis for the officers to search for and seize computers that might have been used in sending the e-mails; documents that might have indicated an association with other conspirators; financial or other documents that might have linked Defendant with the negotiations concerning the Commitment; documents that might have linked Defendant to the e-mails, including information, such as on the paper found in Defendant's wallet, that contained information in the e-mails; and other evidence that

linked Defendant to the crimes believed by Investigator McDonnell to the have been committed. Moreover, the investigators did not search through the computers but instead applied for a separate warrant for this purpose.

Upon examining the circumstances of the case, the Court concludes that the officers acted in the good faith belief that the warrant was proper when they seized the two computers and the document from Defendant's wallet, and finds that the exclusionary rule would serve little deterrent purpose if these items were suppressed. Accordingly, Defendant's motion to suppress the two computers and the handwritten document from Defendant's wallet is denied. To the extent the Government seeks to introduce other evidence obtained in the Brookline search, application must be made *in limine*. If such *in limine* application is made, Defendant may renew his suppression motion relative to the remaining items seized during the Brookline search. See *United States v. Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978) ("the remedy with respect to any items exceeding the scope of the warrant would not [be] invalidation of the search but suppression of those items.").

e. Suppression of Evidence - Electronic Evidence Search Warrant

On February 2, 2010, Steven D. Stein, a Criminal Investigator with the Albany County District Attorney's Office, applied for and received a warrant to search the contents of the electronic devices seized during the Brookline Warrant. See generally Stein Supp. Aff. Stein also requested and received permission to "use the assistance of others with expertise in decoding and/or obtaining password

protections and/or encryptions" in obtaining and storing data from the devices, including using "experts from law enforcement organizations." Feb. 2, 2010 Search Warrant. In making the application, Stein advised New York State Supreme Court Justice Joseph C. Teresi that the electronic devices were seized during execution of the Brookline Warrant, were turned over to Albany County District Attorney's Office investigators, and were, at that time, in the custody of the Albany County District Attorney's Office. Stein Aff., ¶ 10. Stein attached copies of the Brookline Warrant and the Brookline Warrant Supporting Affidavit to his February 2, 2010 supporting affidavit. Id. ¶ 9.

Defendant's arguments that the evidence from the February 2, 2010 Search Warrant should be suppressed are without merit. Stein, as an Albany County District Attorney Investigator, was a qualified police officer authorized to apply for and execute a search warrant under New York state law. See N.Y. Crim. P. Law § 1.20 ("[a]n investigator employed in the office of a district attorney" is a police officer); N.Y. Crim. P. Law § 690.05-2(a) ("[a] search warrant is a court order and process directing a police officer to conduct . . . a search of designated premises"). Defendant's arguments that the warrant was issued in violation of Fed. R. Crim. P. 41 are without merit as Rule 41 does not apply in these circumstances. See *United States v. Burke*, 517 F.2d 377, 382 (2d Cir. 1975) ("the mere fact that property seized pursuant to the warrant of a state judge at the request of state law enforcement officers for violation of state law is offered in a federal prosecution does not implicate the requirements of [Rule 41]; in such cases it is sufficient if the warrant meets the

requirements of the Fourth Amendment"); *United States v. Gotti*, 42 F. Supp. 2d 252 (S.D.N.Y. 1999) (concluding that Fed. R. Crim. P. 41 did not apply to state warrants obtained based on affidavit by a state law enforcement officer even where there was federal involvement in the investigation at the time). Furthermore, assuming, arguendo, that Fed. R. Crim. P. 41 does apply, the Court finds no violation of Fed. R. Crim. P. 41(e)(1). The warrant was issued to Investigator Stein who was, as discussed above, "an officer authorized to execute [the warrant]." Fed. R. Crim. P. 41(e)(1). The Court also finds no violation of Fed. R. Crim. P. 41(b) inasmuch as the electronic devices were in Albany County, New York at the time the search warrant was issued.

Moreover, the Court finds that jurisdiction and venue over the underlying offenses was proper because, as asserted by Stein, the e-mails underlying the alleged crimes were sent to the New York State Comptroller's General Counsel. The New York State Comptroller has offices in New York from which a reasonable inference could be drawn that there was a connection to New York State.

The Court also rejects Defendant's Franks' argument relative to this warrant. Stein did not present a deliberate falsehood in his affidavit by failing to advise Justice Teresi that, as Defendant contends, it is a violation of Massachusetts law to remove the electronic devices from Massachusetts without a turn over order from the Brookline District Court. Stein advised Justice Teresi that the electronic devices were seized in Massachusetts by Brookline police pursuant to a search warrant and

were "turned over to investigators with the [Albany County District Attorney's Office]." Stein Aff., ¶ 4.

Further, assuming arguendo that the turn over procedure used in this case was improper under Massachusetts law, there is no indication that Stein or a reasonably well trained New York police officer would have knowledge of this law, especially in the circumstances present here where the Brookline police turned the fruits of the Brookline search over to the New York investigators. Because a reasonably well trained officer would not have believed that the search warrant issued by Judge Teresi was illegal in light of all of the circumstances, the officers who searched the computers are entitled to the Leon good faith exception relative to the fruits of this warrant.

Accordingly, Defendant's motion to suppress evidence obtained under the February 2, 2010 Search Warrant is denied.

f. Suppression of Evidence - FA Technology Search Warrant

On June 21, 2010, Investigator Stein applied for and received a warrant to search FA Technology Ventures's Albany, New York office for computers and other electronic devices; recordings or listings of passwords or encryption keys for such computers or electronic devices; computer media data storage devices; documents and records that might be evidence of the alleged extortion plot; and instrumentalities of the alleged extortion plot, or which might contain evidence identifying co-conspirators in the alleged extortion plot. The warrant was based, in part, upon evidenced received by Stein that members of FA Technology Ventures had moved Defendant's desktop computer, believed

to have been used in the alleged extortion plot, from Defendant's FA Technology Ventures's Boston, Massachusetts office to FA Technology Ventures's Albany, New York office and locked it in a vacant office room. See Stein June 21, 2010 Supp. Aff. ¶¶ 13-27. The warrant allowed inspection of all items seized and their contents, including a forensic examination of any computer seized. Like with the February 2, 2010 warrant, Stein requested and received permission to "use the assistance of others with expertise in decoding and/or obtaining password protections and/or encryptions" in obtaining and storing data from the devices, including using "experts from law enforcement organizations." June 21, 2010 Search Warrant. Upon executing the warrant, Stein seized a HP Compaq desktop computer and turned the computer over to the FBI for forensic evaluation. See Stein Testimony, pp. 170-71; see also FBI Property Receipt (indicating that a note containing a password was also turned over to the FBI).

The Government argues that Defendant lacks standing to challenge the June 21, 2010 Search Warrant because Defendant was no longer an employee of FA Technology Ventures at the time the warrant was obtained and executed and, therefore, did not have a legitimate expectation of privacy in the place searched. See *United States v. Hamilton*, 538 F.3d 162, 167 (2d Cir. 2008). Defendant contends that he still had a partnership interest in FA Technology Ventures and a legitimate expectation of privacy in the partnership-owned computers "kept in individual private offices behind doors." Def. Reply MOL, p 10. Assuming that Defendant does have standing to challenge the

warrant, the Court finds that Defendant's motion to suppress the evidence seized pursuant to the June 21, 2010 Search Warrant must be denied.

For reasons discussed above, Investigator Stein was authorized under state law to apply for and execute the search warrant, and, assuming that Fed. R. Crim. P. 41 applies, the Court finds no violation of Fed. R. Crim. P. 41(e)(1). The fact that receipt for the property seized under the warrant was issued by the FBI does not invalidate the warrant under the theory the FBI does not have authority to execute search warrants under New York law. As indicated, the warrant was issued to Stein and granted Stein authority to employ "experts from law enforcement organizations" in the search of the data on the electronic devices. As discussed above, the fact that the FBI participated in the search does not invalidate the warrant under Fed. R. Crim. P. 41.

The search warrant is not necessarily unconstitutional in breadth simply because it allowed the seizure of the computer and an examination of its contents. See *United States v. Vilar*, 2007 WL 1075041, at *36 (S.D.N.Y. 2007)(("[T]he computer has become the modern criminal's best friend. It is used to communicate to cohorts, ensnare victims, and generally to prepare and orchestrate criminal conduct. . . . And, it is precisely because computer files can be intermingled and encrypted that the computer is a useful criminal tool. Nefarious documents can be given innocuous names, or can be manipulated, hidden or deleted with great ease. . . . It therefore is unsurprising that some of the most important evidence of criminal

conduct is often found buried in computers.")(citations omitted).

Nevertheless, even if the warrant is adjudged to be overbroad or lacking in particularity, the search is saved by the Leon "good faith" exception. The warrant was not "so facially deficient . .. that reliance upon it is unreasonable." *United States v. Falso*, 544 F.3d 110, 125 (2d Cir. 2008). In addition, in light of the detail of Stein's 22-page supporting affidavit which defines precisely the information that is being sought from the subject computer and the probable cause to believe that the computer in the Albany FA Technology Ventures's Albany office contains evidence of the alleged extortion plot, a reasonably well trained officer would not have believed that the search of the entire contents of the computer would be illegal. See *Vilar*, 2007 WL 1075041, at *36 ("[I]t . . . should not be surprising that a person who uses a computer, or any electronic device, as an instrumentality of crime might discover that a magistrate judge would find probable cause to search that computer."). Further, "[g]iven that . . .'[t]he [Court of Appeals for the] Second Circuit has yet to comprehensively address the unique issues raised by computer searches, and few district courts in this [C]ircuit have had occasion to address the topic,' . . the executing agents were entitled to rely in good faith on the 'objectively reasonable legal conclusions of [the] issuing judge.'" *United States v. Bowen* 689 F. Supp.2d 675, 684-85 (S.D.N.Y. 2010)(quoting in the first instance *Vilar*, 2007 WL 1075041, at *36, and in the second instance *United States v. Buck*, 813 F.2d 588, 592-93 (2d Cir.1987)). Still further, like in *Rosa*, "there is no evidence that the team of officers searched for, or seized, any items that were

unrelated to the crimes for which probable cause had been shown, or that Investigator [Stein] somehow misled [Justice Teresi] regarding the facts of the investigation and intended scope of the search." *Rosa*, 626 F. 3d at 65.

The Court concludes that the officers acted reasonably and in good faith in seeking and executing the warrant, and that, if the warrant is unconstitutionally broad, the exclusionary rule would serve little deterrent purpose in this case. The *Leon* good faith exception to suppression applies to the evidence seized pursuant to this warrant. Id.; see *United States v. Riccardi*, 405 F.3d 852, 863-64 (10th Cir. 2005) (applying the good faith exception to an officer's search of a seized computer for evidence of child pornography despite the warrant's lack of particularity). Accordingly, and for the reasons discussed above, Defendant's motion to suppress evidence obtained under the June 21, 2010 Search Warrant is denied

g. Suppression of Statements

A factual disputes exists as to whether Defendant was subjected to a custodial interrogation on December 3, 2009 when he made statements to the police before being given his Miranda warnings. See *United States v. Badmus*, 325 F.3d 133, 138 (2d Cir. 2003)(Miranda warnings are required only "when a person is interrogated while in custody.") (internal quotation omitted). Accordingly, the Court will hold a factual hearing to resolve these issues. The hearing will be held immediately before the commencement of trial.

h. Compel Discovery

Defendant moves to compel discovery of two types of evidence: (1) forensic images of computers and storage devices, and (2) materials maintained by the Office of the State Comptroller including the General Counsel's 2009 e-mail and the "FATV file". The Government asserts in its opposition papers:

> The portion of his motion seeking to obtain forensic images of computers and storage devices should be denied as moot because he has received forensic images of the computers seized from his home. Forensic images of computers seized from FA Technology offices in Boston and Albany will be provided as soon as this Court approves a proposed protective order. The storage devices have been returned to him along with other property including a Nokia cell phone, seized documents, an Amazon Kindle and power cord, an MP3 player, an audio recorder, and a thumb drive.

Govt. MOL, p. 34.

The protective order was issued shortly after the Government submitted these papers, see dkt. # 19, so the Court presumes that forensic images of computers seized from FA Technology offices in Boston and Albany have been provided to Defendant. Accordingly, this portion of Defendant's motion is denied as moot with leave to renew if Defendant has not received materials under the protective order.

As for the materials maintained by the Comptroller's Office, the Government asserts the

Defendant has been provided material the prosecution team has received from the Comptroller's Office in connection with this investigation with the exception of witness materials which will be provided in accordance with the Criminal Pretrial Order and other relevant authority. Accordingly, this portion of motion is denied with leave to renew if the Defendant does not receive witness materials in accordance with the Criminal Pretrial Order and other relevant authority.

The Government asserts that, to the extent that Defendant seeks additional materials, those materials are maintained by the Comptroller over whom the Government has no control. Because the Government has no duty to produce evidence not in its possession and over which it has no control, this portion of the motion is denied.

IV. CONCLUSION

For the reasons discussed above, Defendant's omnibus motion [dkt. # 13] is **DENIED** in all respects **except** to the extent that Defendant seeks to suppress his statements made to police on December 3, 2009, on which issue the Court **RESERVES** decision and will hold an evidentiary hearing immediately before the commencement of trial. **IT IS SO ORDERED.**

DATED: March 28, 2011

APPENDIX C

OPINION OF THE DISTRICT COURT DENYING PETITIONER'S MOTION FOR A JUDGEMENT OF ACQUITTAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. **1:10-cr-573**

GIRIDHAR SEKHAR,

Defendant.

THOMAS J. McAVOY,
Senior United States District Judge

DECISION & ORDER

I. INTRODUCTION

Defendant Giridhar Sekhar was indicted on one count of attempted extortion, in violation of 18 U.S.C. § 1951(a), and six counts of interstate transmission of an extortionate threat, in violation of 18 U.S.C. § 875(d). Following a jury trial, Defendant

was convicted of attempted extortion, and five of the six counts of interstate transmission of an extortionate threat. Defendant, now represented by counsel,10 moves for a judgment of acquittal or, in the alternative, for a new trial pursuant to Fed. R. Crim. P. 29 & 33. See Motion, dkt. # 81. Defendant contends that the evidence at trial was insufficient to support a conviction on the charges or implicate the Commerce Clause. Id. The Government has opposed the motion, dkt. # 90, and Defendant was allowed to file a reply brief. Dkt. # 91. The Court has determined to decide the motion based on the parties' submissions without the need for oral argument.

II. STANDARDS OF REVIEW

a. Rule 29

Federal Rule of Criminal Procedure 29 provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a); see also Fed. R. Crim. P. 29(c)(1)(allowing for such motions after jury verdicts). However, "[a] defendant challenging the sufficiency of the evidence supporting a conviction faces a 'heavy burden.'" United States v. Glenn, 312 F.3d 58, 63 (2d Cir. 2002) (quoting United States v. Matthews, 20 F.3d 538, 548 (2d Cir. 1994)). On such motions, the Court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Espaillet, 380 F.3d 713, 718 (2d Cir. 2004)(quoting Jackson v.

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10 Defendant represented himself through trial.

Virginia, 443 U.S. 307, 319 (1979)). "The court must not be myopic in its analysis." United States v. Ozbay, 2007 WL 656049, at *1 (N.D.N.Y. Feb. 27, 2007). It must analyze the pieces of evidence in conjunction with each other, Matthews, 20 F.3d at 548, and must apply the sufficiency of the evidence test "to the totality of the government's case and not to each element, as each fact may gain color from others." United States v. Guadagna, 183 F.3d 122, 130 (2d Cir. 1999).

"[C]ourts must be careful to avoid usurping the role of the jury when confronted with a motion for acquittal." United States v. Jackson, 335 F.3d 170, 180 (2d Cir. 2003). In this regard, the Court must avoid substituting its own determination of the weight of the evidence presented and the reasonable inferences that may be drawn from that evidence. Id. "Indeed, it is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence." Id.; see also United States v. Florez, 447 F.3d 145, 154-155 (2d Cir. 2006)("In assessing sufficiency, we are obliged to view the evidence in its totality and in the light most favorable to the prosecution, mindful that the task of choosing among permissible competing inferences is for the jury, not a reviewing court.").

> "'[T]he relevant question is whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Glenn, 312 F.3d at 63 (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979)). A court's analysis considers "'the evidence in its totality,'

> and the Government 'need not negate every theory innocence.'" Glenn, 312 F.3d at 63 (quoting United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000)). . . . The relevant inquiry is "'whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.'" Autuori, 212 F.3d at 114 (quoting United States v. Mariani, 725 F.2d 862, 865 (2d Cir.1984)).

United States v. Triumph Capital Group, Inc., 544 F.3d 149, 158 (2d Cir. 2008).

"A conviction must be upheld if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. If the court concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." United States v. Applins, 637 F.3d 59, 76 (2d Cir. 2011).

b. Rule 33

Federal Rule of Criminal Procedure 33(a) provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a).

> "Generally, a motion for a new trial 'should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of

> justice.'" Smith v. Carpenter, 316 F.3d 178, 183 (2d Cir. 2003) (quoting Atkins v. N.Y. City, 143 F.3d 100, 102 (2d Cir.1998)). A district court has "broad discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." United States v. Ferguson, 246 F.3d 129, 133 (2d Cir. 2001) (quoting United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir.1992)). Though a district court is entitled to "weigh the evidence and in so doing evaluate for itself the credibility of the witnesses," Sanchez, 969 F.2d at 1413 (internal quotation marks omitted), it "must strike a balance between weighing the evidence and credibility of witnesses and not 'wholly usurp[ing]' the role of the jury," Ferguson, 246 F.3d at 133 (quoting Autuori, 212 F.3d at 120). While courts have "broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29," they "nonetheless must exercise the Rule 33 authority 'sparingly' and in 'the most extraordinary circumstances.'" Ferguson, 246 F.3d at 134 (quoting Sanchez, 969 F.2d at 1414).

Triumph Capital Group, Inc., 544 F.3d at 159.

II. BACKGROUND

Defendant, formally a managing partner at FA Technology Ventures Corporation ("FA

Technology"),11 was charged with one count of attempted extortion, in violation of 18 U.S.C. § 1951(a)("the Hobbs Act"), and six counts of interstate transmission of an extortionate threat, in violation of 18 U.S.C. § 875(d), for his alleged conduct of sending extortionate electronic mail ("e-mail") messages to the New York State Comptroller's General Counsel. In this regard, it was alleged that Defendant sent e-mails to the General Counsel threatening to publicly disclose the General Counsel's purported extra-marital affair unless the General Counsel changed his recommendation to the Comptroller concerning whether to commit to invest $35 million of New York State Common Retirement Fund assets with funds managed by FA Technology ("the Commitment").12

At trial, the jury found Defendant guilty of the one count of attempted extortion, and five of the six counts of interstate transmission of an extortionate threat. On the attempted extortion count, the jury concluded that the "property or property right(s) which . . . the Defendant attempt to extort" was "the General Counsel's recommendation to approve the Commitment." See Jury Verdict Sheet, dkt. # 69. On each of the five interstate transmission of an extortionate threat counts of conviction, the jury

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11 FA Technology Ventures Corp. is a venture capital and private equity investment company with offices in Boston, Massachusetts and Albany, New York.

12 3The e-mails were sent shortly after the General Counsel expressed his negative recommendation on the Commitment. A fuller discussion of the allegations contained in the Indictment is set forth in the Court's Decision and Order addressing Defendant's omnibus motion. Familiarity with this decision is presumed.

concluded that "the thing of value that Defendant intended to extort" was "from the General Counsel his recommendation to approve the Commitment." Id.

IV. DISCUSSION

a. Sufficiency of the Evidence - Extortion

Defendant argues that "[b]ecause the jury found [Defendant] guilty based on his alleged attempt to alter [the General Counsel's] official conduct, by way of the Recommendation to the New York State Comptroller, and nothing else, his conviction for extortion under the Hobbs Act cannot stand." Defendant further argues that "the prosecution failed to introduce evidence proving beyond a reasonable doubt that the Recommendation was 'property' or was capable of being 'obtained,' both required elements of extortion under 18 U.S.C. §1951. . . . Moreover, because [Defendant's] convictions under § 875(d) were also predicated upon his alleged extortionate acts, the Government failed to meet its burden as to those convictions as well." Def. MOL pp. 2-3.

As the Court explained in ruling on Defendant's pre-trial omnibus motion, the Hobbs Act seeks to punish "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . ." 18 U.S.C. § 1951(a). "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened . . . fear." 18 U.S.C. § 1951(b)(2). Section 875(d), which seeks to punish "[w]hoever, with intent

to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee . . ., " relies on the Hobbs Act's extortion definition. See United States v. Jackson, 180 F.3d 55, 70 (2d Cir. 1999).

1. Property

Property for purposes of an extortion charge "is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered as a source or element of wealth and does not depend upon a direct benefit being conferred on the person who obtains the property." United States v. Tropiano, 418 F.2d 1069, 1075-76 (2d Cir.1969) (citations omitted). Protected intangible property rights include the right to contract with a party of one's choosing, the right to make various business decisions free from outside pressure, and the right to decide with whom to work. United States v. Gotti, 459 F.3d 296, 325-27 (2d Cir. 2006); see United States v. Vigil, 523 F.3d 1258, 1264 (10th Cir. 2008) (protected intangible rights include the "right to make various business decisions free from outside pressure, and the right to decide with whom to work"); United States v. Lewis, 797 F.2d 358, 364 (7th Cir. 1986)(The property element of a Hobbs Act conviction requires "no more than the [victim's] right to make his business decisions free of threats and coercion, or other intangible rights."). The jury was

instructed on the meaning of property consistent with this legal framework.13

Defendant's e-mails, which threatened to disclose an alleged extra-marital affair by the General Counsel unless the General Counsel changed his recommendation on the Commitment, provided sufficient evidence for the jury to conclude that Defendant intended to deprive the General Counsel of his right to make business decisions free from outside pressure. However, relying on Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990), Defendant argues that the General Counsel's right to make decisions within the scope of his public authority cannot constitute property that can be extorted under the Hobbs Act. Defendant's reliance on West Hartford is misplaced.

In West Hartford, the Town of West Hartford commenced a civil RICO action against Operation Rescue and its members for their protests that prevented access to a health care center that performed abortions. As a predicate RICO crime, the Town alleged that Operation Rescue members' actions at the health care center violated the Hobbs Act. Id. at 94. The "property" that the Town claimed to have been deprived was "a less diligent or softened response from the West Hartford Police to future protest activities at the [health care center] and

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13 The jury was instructed: The term property includes not only money and other physical or tangible things, but also any valuable intangible right considered as a source or element of wealth. Intangible property rights that may be extorted include the right to contract with a party of one's choosing, the right to make various business decisions free from outside pressure, and the right to decide with whom to work.

elsewhere within the Town" id. at 96-97 (quoting complaint), "'the hinderance [sic] of normal routine police activities within the Town of West Hartford [and] the cost of increased manpower and equipment needed to respond to the illegalactivities.'" Id. at 98 (quoting plaintiff's "Response to RICO Case Order"). The Second Circuit ruled that, although the broad concept of property under the Hobbs Act includes"[r]ights involving the conduct of business," id. at 101 (citation omitted),

> the term "property" cannot plausibly be construed to encompass altered official conduct. . . . We note that both the Town's complaint . . . and the district court opinion . . . mention that the Town incurred overtime police expense as a result of defendants' activities. In our view, this does not provide a colorable basis to claim a Hobbs Act violation. Virtually any conduct that elicits a governmental response will require activity by one or more salaried government employees. It is simply not tenable to translate the activation of such a response into a Hobbs Act obtention of "property."

Id. at 102.

This holding resulted in a dissenting opinion, see id. at 105,14 and has been interpreted by the

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14 In the dissenting opinion, Judge Kearse wrote: The majority . . . concludes that the Town has not contended that it Was deprived of property; the majority states that the mere "elicit[ation of] a governmental response [that] will require activity by one or more salaried government employees" is not

Second Circuit as standing merely for the proposition that "governmental response to unlawful acts is not 'property' within the meaning of the Hobbs Act." United States v. Arena, 180 F.3d 380, 393 (2d Cir. 1999), abrogated in part by Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 404 n. 8 (2003). 15 Moreover, as the Second Circuit pointed out in Arena, the West Hartford decision did not reach the issue of whether the health care center itself had a viable Hobbs Act claim based on the deprivation of its right to freely conduct its business. Id. The Second Circuit held in Arena, however, that a health care provider's right to conduct its business as it sees fit, free from outside pressure, is a property right sufficient to support a Hobbs Act prosecution. Id. ("In light of all the evidence, the jury was entitled to infer that [the defendants] intended the butyric acid

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the obtaining of "'property.'" Though I might agree with this statement in the abstract, it is inapposite to the present case. The Town has alleged that "defendants ... engaged in a pattern of extortionate acts, as defined under the Hobbs Act, . . . and those acts have caused injury to . . . property of the plaintiff, including ... extraordinary overtime costs." I think the assertion that the Town has been forced to expend certain identifiable extra sums of money must be accepted as an allegation that it has been deprived pro tanto of "property" within the meaning of the Hobbs Act. The allegation that the Town was required to pay extra moneys to its employees is no less an assertion that it has been deprived of "property" than would be an allegation, for example, that it had been forced against its will to hire an extra employee, or had incurred extra expenses in constructing or operating a municipal building as a result of bid-rigging by suppliers. *Id.* at 105 (Kearse, J., dissenting).

15 The majority in *Scheidler* rejected *Arena*' s broad definition of the term "obtaining" for purposes of the Hobbs Act. *Scheidler*, 537 U.S. at 403 n. 8.

attacks not as isolated instances of vandalism, but rather as part of an overall strategy to cause abortion providers . . . to give up their property rights to engage in the business of providing abortion services for fear of future attacks.") (emphasis added); see e.g. Scheidler, 537 U.S. at 404 ("There is no dispute that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights" to operate their clinics that performed abortions.)

Here, the property deprivation found by the jury is more akin to Arena's "giving up of a right to engage in [a] business" than West Hartford's "elicitation of a governmental response that would require activity by a salaried government employee." The evidence demonstrated that the General Counsel determined, in accordance with his professional opinion reached after review of the facts and circumstances surrounding the Commitment, to recommend to the Comptroller not to approve the Commitment. Defendant's e-mails demanding that the General Counsel change his recommendation provided a sufficient basis for the jury to conclude that Defendant sought to compel the General Counsel to do more than what was otherwise expected of him in his public position (i.e. performing a review of the facts and offering the Comptroller a professional opinion on matters within the scope of his office) as would be a corollary situation to West Hartford. Rather, like the conduct in Scheidler and Arena which deprived the abortion centers of the right to freely operate, the threatening e-mails provided a sufficient basis for the jury to conclude that Defendant intended to deprive the General

Counsel of the property right to freely perform his professional duties as an advisor to the Comptroller.

Moreover, the Court finds no reason why the public nature of the General Counsel's position would negate his protected property right to conduct his business affairs free from outside pressure. Because the evidence was sufficient for the jury to conclude that Defendant intended to deprive the General Counsel of his property right to freely exercise his independent professional judgment, there was sufficient evidence for the jury to find that the property element was established. Accordingly, Defendant's motion for a judgment of acquittal on this ground is denied.

2. Obtaining

Defendant also challenges his convictions on the "obtaining" element of the extortion charges. To prove an extortion charge and to distinguish it from a coercion charge, the Government must prove not only that the Defendant deprived the victim of a property right but also that the Defendant "obtained" that property right. Scheidler, 537 U.S. at 404. "[I]n evaluating . . . whether [an extortion count] adequately alleges the 'obtaining of property' for purposes of the Hobbs Act's definition of extortion – the key inquiry is whether the defendant . . . [1] in the case of attempted extortion, attempted to carry out[] the deprivation of a property right from another, with (2) the intent to exercise, sell, transfer, or take some other analogous action with respect to that right." Gotti, 459 F.3d at 324. "[T]he [Supreme Court's] emphasis [in Scheidler] on the possibility of exercising, transferring, or selling the property [is] a concern with the extortionist's intent with respect to

the property at issue." Id. at 323 (emphasis in original).

In Gotti, the Second Circuit provided examples of how an extortion victim's property interest might be exercised, transferred, or sold.

> In the first example, the victim is ordered to exercise his or her rights in accordance with the extortionist's wishes, such that the extortionist is essentially controlling the exercise of those rights. In the second example, the victim is ordered to transfer his or her rights over to the extortionist so that the extortionist can simply exercise those rights himself or herself. (A closely related variant would be where the extortionist orders the victim to transfer the rights to a third party of the extortionist's choosing.) In the third example, the victim's right is sold by the extortionist to a third party of the extortionist's choosing. The precise demarcation between an exercise and a transfer may certainly be subject to debate. Because the critical question is simply whether the defendant sought to exercise, transfer, or sell the rights at issue, however, we are less concerned with line-drawing between those terms than with the unifying principle for the "exercise, transfer, or sale" framework: the defendant's intent to do something affirmative with respect to the property right.

Gotti, 459 F.3d at 324 n. 9.

The Gotti Court then considered several extortion counts challenged by the defendants under the holding of Scheidler. One count related to certain defendants' scheme to use their control over the Management International Longshoremen's Association Managed Health Care Trust Fund ("MILA") to ensure that a Gambino Family-associated business received MILA's pharmaceutical services contract. Id. at 326. The operators of the business were alleged to have been willing to pay kickbacks to the defendants for the contract. The Second Circuit determined that this scheme qualified as extortion under the Hobbs Act because "the defendants sought to obtain the MILA participants' and beneficiaries' rights to have the MILA trustees contract with the service provider . . . of the trustees' choice . . . [and] that the defendants sought to exercise these rights for themselves by telling the MILA trustees which service provider to support." Id. Under this scheme, "the defendants exercised the rights in question in order to profit themselves" thereby constituting a viable Hobbs Act offense. Id.

The jury in this case was charged as to the "obtaining" requirement consistent with Scheidler and Gottii.16 The allegations in the first example

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16 The jury was charge on the "obtaining" element as follows:

In an attempted extortion case, the Government must prove that the Defendant attempted to "obtain" property.
A person obtains property by depriving another of the property and by exercising control over it, by transferring it to another, or by selling it. A person obtains an intangible property right in the same way. That is, by exercising control over another person's intangible property right, by transferring the intangible property right to a third party, or by selling the intangible property right to a third party.

given by the Second Circuit in Gotti, and in the MILA count addressed in that case, fit squarely with the counts of conviction in the instant case. The language of Defendant's e-mails provided sufficient evidence for the jury to conclude that Defendant intended to exercise control over the General Counsel's intangible property right to make an unfettered decision whether to recommend approval of the Commitment. The first substantive e-mail clearly established this point, stating: "Here is what I want you to do: 1) Go to [the Comptroller and others involved in the investment decision] and tell them you've had a few days to think things over and have had a change in heart. You now recommend moving forward with this fund " Nov. 18 2009 E-mail. The e-mail also threatened that if the General Counsel failedto comply, Defendant would publicly disclose the alleged extra-marital affair. See id. The obtaining element was satisfied in much the same manner as the first example in Gotti, and in the MILA count addressed in Gotti. That is, the evidence provided a

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An example of an extortionist obtaining an intangible property right is where a victim is ordered to exercise his or her rights in accordance with the extortionist's wishes, such that the extortionist is essentially controlling the exercise of those rights.

Mere interference with another's exercise of an intangible property right is insufficient because interference alone does not satisfy the requirement that the Defendant attempted to obtain the property right.

The Government must prove that the Defendant believed that the victim had the power to control the thing of value that Defendant sought. Whether the victim actually had this power is irrelevant.

sufficient basis for the jury to conclude that Defendant intended to "obtain" the General Counsel's intangible property right to conduct his business free from outside pressure by ordering the General Counsel to exercise this right it in a manner consistent with Defendant's desire. This provided a sufficient basis for the jury to conclude that Defendant intended to do more than merely interfere with the General Counsel's right to make professional decisions, but rather that he intended to obtain the right so that it would be exercised in accordance with Defendant's desires. Accordingly, Defendant's motion for a judgment of acquittal on the ground that the obtaining element has not been satisfied is denied.

3. A Thing of Value

Defendant also argues that there was insufficient evidence that the General Counsel's recommendation regarding the Commitment was a "thing of value" sufficient to support an extortion conviction. In this regard, Defendant points to evidence indicating that the investment process in the Comptroller's Office was complex with numerous inherent hurdles that could derail any investment decision. From this, Defendant arguesthat even if the General Counsel had recommend approval of the Commitment, the investment of the Common Retirement Fund with FA Technologies was not a sure thing, and, therefore, the General Counsel's recommendation in and of itself had no real value. Further, Defendant points to testimony indicating that the Commitment itself could not be sold, transferred, or enforced in court and, therefore, had no independent monetary value. From this,

Defendant argues that the recommendation to approve the Commitment could have no monetary value. Finally, Defendant argues that "thing of value" which is the subject of an extortion must be of value to the victim. From this, Defendant argues that because the General Counsel "is a public employee who receives the same compensation regardless of his recommendations or advice," his recommendation had no monetary value to him and, therefore, could not support an extortion charge. The Court disagrees with each argument.

To "obtain" property under the Hobbs Act the defendant must have a "pursued [ ] or received 'something of value from' [the victim] that [the defendant] could exercise, transfer or sell." Scheidler, 537 U.S. at 405 (quoting United States v. Nardello, 393 U.S. 286, 290, 89 S. Ct. 534, 21 L. Ed.2d 487 (1969)); see United States v. Hui Chen, 350 Fed. Appx.520, 522, 2009 WL 3429757, at * 2 (2d Cir. Oct. 27, 2009)("The Gotti rule is that if a defendant interferes with a person's intangible rights for the sake of enrichment, then this constitutes both a deprivation and an acquisition of the defendant's property."); see also Gotti, 459 F.3d at 324-325 ("A motive ultimately to profit by cashing out the value of the property right will generally serve as powerful evidence that the defendant's goal was to obtain the right for himself, rather than merely to deprive the victim of that right."). The jury was charged on the "thing of value" requirement consistent with the controlling law, taking into account that Defendant was charged in Count 1 with attempted extortion.17

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17 The Court instructed the jury with regard to the "thing of value" requirement on Count 1 as follows:

Although the evidence indicated that the approval of the Commitment would not guarantee the Common Retirement Fund investment with FA Technologies, the evidence was sufficient for the jury to reasonably conclude that Defendant believed at the time he sent the e-mails that the General Counsel's negative recommendation was the reason the Commitment was not going forward. See e.g. Nov. 18 2009 e-mail ("Last week u did something that was wrong. U blackballed a recommendation on a fund from the investment staff . . . . "). Moreover, the evidence provided a sufficient basis for the jury to reasonably conclude that Defendant believed that

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> Because the property right must be a source of wealth, in an attempted extortion case involving an intangible property right the Government must prove that the Defendant attempted to exercise control over the intangible property right in a manner that would potentially provide Defendant with some form of enrichment. Put another way, the Government must prove that the Defendant attempted to "obtain" the intangible property right by seeking to deprive the victim of the free exercise of the right and, instead, ordering the victim to exercise the right in a manner that would potentially enrich Defendant.

The Court instructed the jury on the "thing of value" requirement on Counts 2-7 as follows:

> A "thing of value" is anything that has monetary value to the Defendant, whether it is tangible or intangible. Tangible property and intangible property rights that have the potential to enrich the defendant are things of value. You should apply my prior instruction on tangible property and intangible property rights here, and I will not repeat it at this time.

if the General Counsel changed his recommendation to approve the Commitment, it would set into motion a series events by which the Common Retirement Fund's assets would be invested through FA Technologies as had been done in the past. See id. ("[I] need you to make a fix. . . . Go to [the Comptroller and others involved in the investment decision] and tell them you've had a few days to think things over and have had a change in heart. You now recommend moving forward with this fund . . . ."); Nov. 18, 2009 (8:43 PM) e- mail (Subject: "36 hours left"; Content: "To make the wrong right"); Nov. 19, 2009 e-mail ("[I]f you don't like this draft [of a proposed letter to the Attorney General disclosing the alleged extra-marital affair], then you should go forward with the other solution that I suggested in the other email from yesterday. [T]hat might put a quick end to the problem."); Nov. 19, 2009 e-mail (Subject: "24 hours left"; Content: "To make the wrong right"). Because "the key inquiry for the jury in an attempted extortion charge is whether the defendant[] thought [the victim]" had the power to control the property that was the subject of the extortion, it is irrelevant whether the evidence established that the General Counsel's recommendation actually controlled the investment process. See United States v. Ivezaj, 568 F.3d 88, 95 (2d Cir. 2009). Taken as a whole, the evidence was sufficient for the jury to reasonably conclude that, at the time Defendant sent the e-mails, he believed (1) that the General Counsel had stopped the Commitment by recommending against approval, and (2) if Defendant's demand had been met and the recommendation was made, this would be the "fix" or the "solution" so that the Commitment could go

forward and the investment made with FA Technology as had been done in the past.

The evidence also provided a sufficient basis for the jury to conclude that if the Commitment went forward, FA Technologies would benefit financially in the form of management fees and profits earned on the investments. See 4/15/11 Trans., pp. 114-118; Govt. Ex. 19A, 19B. From this, the jury could reasonably conclude that Defendant, as a managing partner, would himself benefit financially. Moreover, because the evidence need not establish that Defendant was directly enriched by the property he sought to obtain, the causal connection between the General Counsel's recommendation to approve the Commitment and Defendant's potential enrichment as a managing partner at FATechnologies is sufficient. See Tropiano, 418 F.2d at 1075-76 (Property under the Hobbs Act includes "any valuable right considered as a source or element of wealth and does not depend upon a direct benefit being conferred on the person who obtains the property."). Thus, in the same sense that the MILA trustees' decision on a service provider had value for the defendants in Gotti, the Comptroller's decision on an investment firm for the Common Retirement Fund had value for Defendant. Because the evidence was sufficient for the jury to conclude that Defendant believed the General Counsel's recommendation was the "fix" or "solution" necessary to secure the investment with FA Technology, it was reasonable for the jury to conclude that the recommendation had value to Defendant.

Similarly, the fact that the Commitment could not legally be transferred, sold, or enforced does not

negate the reasonable inference that the General Counsel's recommendation on the Commitment had value to Defendant. Indeed, the value to Defendant of the General Counsel's recommendation on the Commitment is no different than the value to the Gotti defendants of the MILA trustees' decision on the service provider for the MILA pharmaceutical contract. Although neither constituted a legally binding contract that could be sold, transferred, or enforced in court, both were intangible property rights that had value to the defendants depending on how the property rights were exercised.

There is also no merit to Defendant's argument that the property right that is the subject of the extortion plot must have monetary value to the victim. Defendant has cited no cases supporting this argument, and the Court finds no basis to accept this proposition. As the case law instructs, the critical question is whether the defendant sought to obtain something of value that the defendant could exercise, transfer or sell exercise. Scheidler, 537 U.S. at 405. The focus is on whether the property or property right that is the subject of the extortion is of value to the defendant. While in some situations the subject property or property right might have monetary value to the defendant and the victim, this is not necessarily true in every case. Indeed, it is doubtful that the MILA Trustee's right to make an unfettered decision on which provider to select in the Gotti case had any monetary value to the Trustees themselves, and certainly not the monetary value that this property right had for the defendants who stood to be enriched if the decision was exercised in accordance with their desires. Here, as in Gotti, the property right that was the subject of the extortion plot could

have value to Defendant even if it had no monetary value to the General Counsel.

Although Defendant presented evidence of the uncertainty of the Commitment approval process and the unalienable nature of the Commitment, this evidence does not negate the reasonable inference that, at the time Defendant acted, he believed that the General Counsel's recommendation for approval of Commitment would be the "fix" necessary to ensure another multimillion dollar investment with his firm. While Defendant was free to argue to the jury that the recommendation for approval of the Commitment was worthless, the jury was well within its right to conclude otherwise. Defendant's motion for a judgment of acquittal on this ground is denied.

4. Commerce Clause

Defendant also argues that there was insufficient evidence to support Commerce Clause jurisdiction for Count 1. The Court disagrees. The Second Circuit has "consistently held that only a de minimus showing is necessary to establish the interstate nexus required for Hobbs Act jurisdiction. Indeed, it is the law in our circuit that if the defendants' conduct produces any interference with or effect upon interstate commerce, whether slight, subtle or even potential, it is sufficient to uphold a prosecution under the Hobbs Act." United States v. Silverio, 335 F.3d 183, 186 (2d Cir. 2003) (internal citations and quotation marks omitted); see also United States v. Wilkerson, 361 F.3d 717, 726 (2d Cir. 2004)("Indeed, the jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. Even a potential or subtle effect will suffice.")(internal

citations and quotation marks omitted); United States v. Jamison, 299 F.3d 114, 118 (2d Cir. 2002) ("We have long recognized that the requirement of showing an effect on commerce involves only a minimal burden of proving a connection to interstate commerce, and is satisfied by conduct that affects commerce in any way or degree.") (internal quotation marks and citations omitted), cert. denied, 537 U.S. 1196, 123 S. Ct. 1258, 154 L. Ed.2d 1033 (2003); United States v. Perrotta, 313 F.3d 33, 37-38 (2d Cir. 2002).18 The jury was charged on the commerce clause requirement consistent with this minimal burden.19

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[18] "The jurisdictional nexus could be satisfied by showing that the victim directly participated in interstate commerce; that the victim was targeted because of [his] status as an employee at a company participating in interstate commerce; that the harm or potential harm to the individual would deplete the assets of a company engaged in interstate commerce; that the crime targeted the assets of a business rather than an individual; or that the individual was extorted of a sum so large, or targeted in connection with so many individuals, that the amount at stake cumulatively had some effect on interstate commerce[.]" *United States v. Perrotta*, 313 F.3d 33, 37-38 (2d Cir. 2002) (internal citations omitted).

[19] The jury was instructed on the Commerce Clause element as follows:

On the Second Element, the government must prove that the defendant's actions obstructed, delayed, or affected commerce in any manner or any degree. The term "obstructs, delays, or affects commerce" means any action which, in any manner or to any degree, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in interstate commerce. Interstate commerce is commerce between any two or more states, and includes the transfer or investment of funds between two or more states.

There was sufficient evidence for the jury to conclude that, had Defendant succeeded in his attempted extortion scheme, there would have been an impact on interstate commerce. In this regard, the evidence provided a sufficient basis for the jury to conclude that, had the Commitment gone forward and the Common Retirement Fund's assets invested through FA Technology, some of that money would have been invested outside of New York. See 4/13/11 Trans. pp 66, 126; 4/15/11 Trans. p 113. Further, the evidence was sufficient to establish that, had the Commitment gone forward, FA Technology would have earned substantial income. Inasmuch as FA Technology had an office in Boston, Massachusetts where Defendant worked, it would be a fair inference that the Commitment would have an effect on interstate commerce through the transfer of these funds from New York to Massachusetts. Accordingly, the motion for a judgment of acquittal on this ground is denied.

If you decide that there was any effect at all on interstate commerce, whether slight, subtle, or even potential, then that is enough to satisfy this element. If you decide that interstate commerce would potentially or possibly be affected if defendant had successfully and fully completed his actions, then the element of affecting commerce is satisfied. You do not have to find that interstate commerce was actually affected. It is not necessary for the government to prove that the defendant actually intended to specifically affect interstate commerce. All that is necessary as to this issue is that the government's evidence prove that the defendant intended to commit an act forbidden by the statute, the natural consequences of which would be to obstruct, delay, or affect interstate commerce.

b. Jury Instructions

The Court finds no merit to Defendant's challenges to the jury instructions. His challenges are based upon references to isolated sentences or portions of sentences within the instructions, but it is well settled that a jury instructions must be reviewed in their entirety. See United States v. Mitchell, 328 F.3d 77, 82 (2d Cir. 2003) ("'We review a jury charge in its entirety and not on the basis of excerpts taken out of context'") (quoting United States v. Zvi, 168 F.3d 49, 58 (2d Cir. 1998)); United States v. Schultz, 333 F.3d 393, 413-14 (2d Cir. 2003) ("we review the court's instructions to determine whether considered as a whole, the instructions adequately communicated the essential ideas to the jury.") (internal brackets and quotation mark omitted)). The Court is of the opinion that the jury charge properly instructed the jury on the applicable law in this case. Therefore, Defendant's motion for a judgment of acquittal or a new trial on this ground is denied.

c. New Trial

The Court finds sufficient evidence supporting the jury's findings, and that the jury's verdicts are not legally erroneous or miscarriages of justice. Accordingly, Defendant's motion for a new trial is denied.

VI. CONCLUSION

For the reasons set forth above, Defendant's motion for judgement of acquittal, or in the alternative, a new trial [dkt. # 81], is **DENIED** in all respects.

IT IS SO ORDERED

DATED:July 26, 2011

OPPOSITION BRIEF

No. 12-357

In the Supreme Court of the United States

GIRIDHAR C. SEKHAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner attempted to obtain "property" by means of extortion, in violation of 18 U.S.C. 1951(a) and 18 U.S.C. 875(d), by seeking to exercise, through threats, the right of an attorney to make a recommendation pertaining to a pension fund investment from which petitioner sought to profit.

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In the Supreme Court of the United States

No. 12-357

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 683 F.3d 436. The opinions of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 14a-66a) and denying petitioner's motion for a judgment of acquittal (Pet. App. 67a-93a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2012. The petition for a writ of certiorari was filed on September 19, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted on one count of attempted extortion, in viola-

tion of the Hobbs Act, 18 U.S.C. 1951(a), and five counts of interstate transmission of extortionate threats, in violation of 18 U.S.C. 875(d). Pet. App. 1a, 5a. He was sentenced to 15 months of imprisonment. *Id.* at 6a. The court of appeals affirmed. *Id.* at 1a-13a.

1. This case involves conduct related to New York's Common Retirement Fund, which is the employee pension fund for the State of New York and various of its local governments. Pet. App. 2a. The State Comptroller is the sole trustee of the Fund and has final approval over all of the Fund's investments. *Ibid.* When the Comptroller approves an investment on behalf of the Fund, he issues what is known as a Commitment. *Ibid.* Fund investments in a company are sometimes contingent on the company's attracting other investors, and a formal Commitment assists the company in doing so by signaling that the company has the backing of the Fund. *Ibid.* A Commitment does not bind the Fund to invest, however, as the parties must first execute and close on a limited partnership. *Ibid.*

In October 2008, the Comptroller's Office considered investing $35 million in a fund run by a company called FA Technology Ventures. Pet. App. 2a. That investment—known as "FA Tech II"—never closed. *Ibid.* In April 2009, the Comptroller's Office prohibited investments marketed by placement agents. *Id.* at 3a. FA Technology Ventures had used a placement agent for FA Tech II. *Ibid.* In October 2009, the Comptroller's Office was considering whether to invest in two other funds—known collectively as "FA Tech III"—that were also run by FA Technology Ventures. *Id.* at 2a-3a. FA Technology Ventures did not use a placement agent for FA Tech III, but the investment was "essentially the same" as the FA Tech II investment. *Id.* at 3a. Based

on the proposed terms, FA Technology Ventures would earn nearly $7.6 million in management fees from the proposed investment over ten years and could earn more depending on the investment's performance. *Ibid.*

While the Comptroller's Office was considering whether to invest in FA Tech III, the Office's General Counsel was advised by the Office of the New York State Attorney General that it was investigating the placement agent involved in FA Tech II. Pet. App. 3a. The Attorney General's Office advised the General Counsel that the Pension Fund should avoid moving forward with the FA Tech III investment and the General Counsel recommended to his office that "it would be prudent, from a legal perspective, to avoid moving forward" with the FA Tech III investment. *Ibid.* Accordingly, on November 13, 2009, the Comptroller decided not to approve that investment. *Ibid.*

On November 17, 2009, the General Counsel of the Comptroller's Office received an anonymous e-mail to his work account requesting that he provide his personal e-mail address to receive a report of a "serious ethical issue." Pet. App. 4a. The General Counsel both advised the anonymous e-mailer to contact the Inspector General and provided a personal e-mail address. *Ibid.* The e-mailer then sent an e-mail to the General Counsel's personal e-mail address, accusing the General Counsel of "blackball[ing] a recommendation on a fund" and threatening that the e-mailer would tell the General Counsel's wife that the General Counsel was having an extramarital affair if the General Counsel did not have a "change of heart" by November 20, 2009. *Ibid.* (brackets in original). The anonymous e-mailer sent another e-mail later that night, warning the General Counsel that he had "36 hours left" in which to "make wrong the

right." *Ibid.* A similar e-mail arrived the following day, along with a draft letter to the Attorney General disclosing the alleged affair. *Ibid.*

On the advice of law enforcement agents, the General Counsel asked the e-mailer for more time. Pet. App. 4a. On Monday, November 23, the e-mailer assured the General Counsel that he would "never hear about this again" if he could "get this fixed by Wednesday," November 25. *Ibid.* On December 1, the anonymous e-mailer sent another message, this time referring to Tiger Woods and stating: "[W]ho would have thought that a woman could get that upset . . . and over what?" *Ibid.* (alterations in original).

The Federal Bureau of Investigation (FBI) traced some of the e-mails to petitioner's home in Brookline, Massachusetts. Pet. App. 4a. Petitioner was a managing partner of FA Technology. *Id.* at 4a-5a. After the FBI executed a search warrant at petitioner's home, petitioner admitted to sending the anonymous e-mails and a forensic examination confirmed that petitioner's computer was the source of the e-mails. *Id.* at 5a.

2. Petitioner was indicted on one count of attempted extortion, in violation of the Hobbs Act, 18 U.S.C. 1951(a), and six counts of interstate transmission of extortionate threats, in violation of 18 U.S.C. 875(d). Under the Hobbs Act, an individual is criminally liable if he "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in interstate commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). Un-

der 18 U.S.C. 875(d), an individual is criminally liable if he, "with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee." The parties in this case agreed that the Hobbs Act's definition of "extortion" also applies to Section 875(d). Pet. App. 7a; see *United States* v. *Jackson*, 180 F.3d 55, 70 (2d Cir. 1999) ("extortion" has the same meaning in Sections 1951(a) and 875(d)).

The indictment alleged that petitioner wrongfully attempted to obtain (1) the General Counsel's recommendation to approve the Commitment, (2) the Comptroller's approval of the Commitment; and (3) the Commitment itself. Pet. App. 5a. Before trial, petitioner filed a motion to dismiss the indictment, arguing (*inter alia*) that the indictment failed to state an offense because the General Counsel's recommendation is not "property" within the meaning of Section 1951(b)(2) and that the indictment did not allege that petitioner had threatened any person who had the power to issue the Commitment. See *ibid.* The district court denied the motion, explaining that "the General Counsel's right to make professional decisions without outside pressure is an intangible property right," *id.* at 24a, and that the indictment sufficiently alleged that petitioner "interfered with the General Counsel's intangible right for the sake of his own enrichment, thus constituting both a deprivation and an attempt to acquire property under the Hobbs Act," *id.* at 25a.

After a jury trial, petitioner was convicted on the attempted extortion count and on five of the six interstate-transmission counts. Pet. App. 5a-6a. Petitioner filed a

motion for a judgment of acquittal or a new trial based on the alleged insufficiency of the evidence. *Id.* at 6a. The district court denied the motion, finding that there was sufficient evidence that petitioner intended to deprive the General Counsel of the property right to freely perform his professional duties, *id.* at 78a; that petitioner attempted to obtain control of that right for himself, *id.* at 83a; that petitioner believed that his blackmail scheme would lead to a Commitment, *id.* at 85a-86a; and that a Commitment would benefit petitioner financially, *id.* at 87a.

3. On appeal, petitioner argued that that the indictment failed to state an offense and that the evidence was insufficient to support his convictions. See Pet. App. 6a. In support of both contentions, petitioner argued that his conduct did not constitute extortion because the General Counsel's recommendation was not "property" under the Hobbs Act. *Ibid.* The court of appeals rejected petitioner's arguments. *Id.* at 6a-13a.

The court of appeals observed that the Hobbs Act defines "[t]he term 'extortion' [to] mean[] the obtaining of property from another, without his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Pet. App. 7a (quoting 18 U.S.C. 1951(b)(2)). In order to determine whether a defendant has "obtain[ed]" or attempted to obtain "property," the court explained that it must undertake a two-part inquiry, determining both "whether the defendant is (1) alleged to have carried out (or in the case of attempted extortion, attempted to carry out) the deprivation of a property right from another," and whether the defendant did so "with (2) the intent to exercise, sell, transfer, or take some other analogous action with respect to that right." *Id.* at 7a-8a. The court further not-

ed that the term "property" under the Hobbs Act "is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered as a source or element of wealth." *Id.* at 8a (quoting *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970)). The court specifically noted that "[t]he right to pursue a lawful business . . . has long been recognized as a property right," *ibid.* (quoting *Tropiano*, 418 F.2d at 1076), as has been the right to "conduct a business free from threats" and "to make various decisions . . . free from outside pressure." *Ibid.* (quoting *United States* v. *Arena*, 180 F.3d 380, 394 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000), and *United States* v. *Gotti*, 459 F.3d 296, 327 (2d Cir. 2006), cert. denied, 551 U.S. 1144 (2007)).

The court of appeals concluded that the General Counsel of the Comptroller's Office "had a property right in rendering sound legal advice to the Comptroller, and, specifically, to recommend—free from threats—whether the Comptroller should issue a Commitment for FA Tech III." Pet. App. 8a-9a. The court rejected petitioner's argument that the General Counsel's recommendation was not a "source or element of wealth" for the General Counsel, observing that "[t]he value and worth of a lawyer's services may be said generally to depend on freedom from conflict, including a conflict created by personal blackmail." *Id.* at 9a. In any event, the court noted that a property right need not be a source of wealth to the target of the extortion as long as it has value to the extortionist. *Id.* at 9a-10a.

The court of appeals also rejected petitioner's argument that he had not pursued something of value that he could exercise, transfer, or sell. Pet. App. 11a-13a. The court concluded that petitioner not only had attempted

to deprive the General Counsel of his right to make a recommendation free from blackmail, but also had "attempted to exercise that right by forcing the General Counsel to make a recommendation determined by [petitioner]." *Id.* at 12a. The court acknowledged that a positive recommendation from the General Counsel would not have guaranteed a Commitment and that a Commitment would not have guaranteed an investment. *Ibid.* But the court explained that the benefit conferred on the extortionist need not be "direct"; it is sufficient, the court stated, if the extortionist exercises the extorted right for the purpose of obtaining the benefit. *Id.* at 12a-13a. Here, the court concluded that "the evidence showed that a positive recommendation by the General Counsel would have increased the chances that the Comptroller would issue a Commitment; that a commitment was necessary for FA Tech III to receive a Pension Fund investment; and that an investment would have resulted in management fees for FA Technology and profit for [petitioner], as a managing partner." *Id.* at 13a. Accordingly, the court held, the evidence was sufficient to show that petitioner, "in order to profit, attempted to exercise the General Counsel's property right to make recommendations." *Ibid.*

ARGUMENT

Petitioner renews his challenge (Pet. 10-31) to his Hobbs Act and Section 875(d) convictions, arguing that the General Counsel's recommendation to the Comptroller was not "property" for purposes of his attempted extortion convictions under 18 U.S.C. 1951(b)(2) and 875(d). The court of appeals correctly rejected petitioner's arguments. Review of that decision is not warranted because it does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals correctly held that the indictment alleged a violation of the Hobbs Act and Section 875(d) and that sufficient evidence supported petitioner's convictions of those crimes.

a. The Hobbs Act makes it a crime for anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). This Court has made clear that "the extortion provision of the Hobbs Act * * * require[s] not only the deprivation but also the acquisition of property." *Scheidler* v. *NOW, Inc.*, 537 U.S. 393, 404 (2003).

For purposes of the Hobbs Act, "property" includes "something of value" that a person can "exercise, transfer, or sell." *Scheidler*, 537 U.S. at 405 (quoting *United States* v. *Nardello*, 393 U.S. 286, 290 (1969)). It thus includes not only the tangible and intangible assets of a business, but also the control over those assets. Consistent with that understanding, in the first appellate decision to consider the issue under the Hobbs Act, *United States* v. *Tropiano*, 418 F.2d 1069, 1076 (1969), cert. denied, 397 U.S. 1021 (1970), the Second Circuit held that defendants who threatened owners of a garbage removal company with physical violence unless the owners ceased soliciting customers in certain areas extorted the owners' property "right to solicit business from anyone in any area without any territorial re-

strictions" by the defendants.[1] Every appellate court that has considered the issue since has held that "property" under the Hobbs Act includes the intangible right to control a business in any legitimate manner.[2] And this Court held in an analogous context that the exclusive right to control the use of corporate assets is itself property. *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987).

b. The court of appeals' decision is consistent with these principles. As the Second Circuit has previously held, an extortionist "obtains" his victim's intangible property rights when he "order[s the victim] to exercise his or her rights in accordance with the extortionist's wishes, such that the extortionist is essentially controlling the exercise of those rights." *United States* v. *Gotti*, 459 F.3d 296, 324 n.9 (2d Cir. 2006), cert. denied, 551 U.S. 1144 (2007). In this case, the General Counsel's right to make a recommendation to the State Comptrol-

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[1] *Scheidler* did not consider this issue; indeed, it explicitly disavowed that it had "reject[ed] lower court decisions such as *Tropiano*" that had held that intangible business interests may constitute property under the Hobbs Act. 537 U.S. at 402 n.6.

[2] *Tropiano*, 418 F.2d at 1075-1076; *United States* v. *Arena*, 180 F.3d 380, 393 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000); *Libertad* v. *Welch*, 53 F.3d 428, 444 n.13 (1st Cir. 1995); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), cert. denied, 493 U.S. 901 (1989); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985), cert. denied, 475 U.S. 1024 (1986); *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), cert. denied, 450 U.S. 916, 985, and 452 U.S. 905 (1981); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979); *United States* v. *Franks*, 511 F.2d 25, 32 n.8 (6th Cir.), cert. denied, 422 U.S. 1042, 1048 (1975); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973).

ler on the legal implications of his investment decisions qualified as property within the meaning of the Hobbs Act. As the court of appeals explained, giving legal advice is a lawyer's "'stock in trade.'" Pet. App. 8a (quoting *In re San Juan Dupont Plaza Hotel Fire*, 111 F.3d 220, 237 n.19 (1st Cir. 1997)); see also, *e.g.*, *United States* v. *Jurado*, 996 F.2d 312 (Table), No. 92-2151, 1993 WL 207444, at *2 (10th Cir. June 10, 1993) ("[A] lawyer's stock in trade is his time and advice."); *United States* v. *Bertoli*, 994 F.2d 1002, 1023 (3d Cir. 1993) (same); *United States* v. *Bloom*, 149 F.3d. 649, 657 (7th Cir. 1998) (Bauer, J., dissenting) (same). The value of a lawyer's advice to his client (and thus to the lawyer himself) depends on the lawyer's freedom to exercise his legal judgment in his client's best interest. When a lawyer is deprived of that freedom through blackmail, his advice—*i.e.*, the service he provides—becomes worthless. The General Counsel's right to make a recommendation on FA Tech III consistent with his legal judgment thus had economic value for the General Counsel and constituted property.

c. Petitioner argues (Pet. 18-19) that an individual's right to make "business decisions" free from interference does not qualify as property under the Hobbs Act unless the decisions implicate "a revenue stream."[3] Petitioner is incorrect. A lawyer's advice to his client is the product that a lawyer sells and therefore constitutes intangible property that is capable of being extorted within the meaning of the Hobbs Act. Accordingly, the courts of appeals to address the issue have uniformly

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[3] Petitioner does not explain how the facts of this case do not involve business decisions implicating a revenue stream as well. The very purpose of petitioner's blackmail scheme was to obtain the Fund's investment money.

held that the right to make business decisions free from outside threats may constitute property under the Hobbs Act. See, *e.g.*, *United States* v. *Vigil*, 523 F.3d 1258 (10th Cir.), cert. denied, 555 U.S. 886 (2008); *Gotti*, 459 F.3d at 327; *United States* v. *Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978); *Tropiano*, 418 F.2d at 1076.

Petitioner argues that the General Counsel's recommendation decision does not qualify as such a decision because the General Counsel's position was "a 'job' and not a business." Pet. 21. But that argument has no merit. The relationship between the Comptroller and the General Counsel was no less an attorney-client relationship than that between a private-sector lawyer and his clients. See Restatement (Third) of Law Governing Lawyers § 74 (2000) ("[T]he attorney-client privilege extends to a communication of a government agency"). And the professional livelihood of a government lawyer is no less dependent on his ability to provide disinterested legal advice than is that of a private-sector lawyer.

Petitioner errs in relying (Pet. 19) on this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). In that case, the Court held that a "generalized right to be secure in one's business interests," free from a competitor's false advertising about his own product, is not "property" within the meaning of the Fourteenth Amendment because it does not encompass "the right to exclude others." *Id.* at 672-673. But the same cannot be said of an attorney's right to exercise judgment free of unlawful influence such as blackmail. The General Counsel alone had the right to make his recommenda-

tion to the Comptroller—a right that necessarily "excluded" others such as petitioner from improperly interfering with that decision. In any case, the Court in *College Savings Bank* did not even purport to address (much less reject) whether the intangible right of a lawyer to provide his client with legal advice free from threats by an outside party qualifies as "property" under the Hobbs Act.

d. Petitioner also contends (Pet. 26-31) that the court of appeals erred in concluding that the General Counsel's right to make a recommendation qualified as property because its economic value to petitioner was merely "speculative." Petitioner contends that the value of the General Counsel's recommendation, standing alone, does not have value because it did not guarantee the issuance of a Commitment, which itself would not guarantee an actual investment by the Pension Fund in FA Tech III. See Pet. 26-30. While a favorable recommendation might or might not have resulted in an actual investment in petitioner's fund, the object of petitioner's blackmail scheme was to secure the General Counsel's recommendation. By attempting to force the General Counsel to exercise his right to make a recommendation in a particular way, petitioner attempted simultaneously to deprive the General Counsel of a property right and to exercise the right for himself. That is a violation of the Hobbs Act.

An attempt offense such as petitioner's, moreover, depends on the mental state of the wrongdoer. See *United States* v. *Williams*, 553 U.S. 285, 300 (2008) (factual impossibility not a defense to crime of attempt); *United States* v. *Engle*, 676 F.3d 405, 420 (4th Cir.) (same), cert. denied, No. 11-10590, 2012 WL 1985452 (Oct. 1, 2012); *United States* v. *Ivezaj*, 568 F.3d 88, 95

(2d Cir. 2009) ("only the defendants' state of mind is relevant"), cert. denied, 130 S. Ct. 1749, 1751 (2010). Accordingly, in order to prove that control over the General Counsel's recommendation had economic value for petitioner, it was enough for the government to show that petitioner *believed* that such control would yield an investment, even if that result was not in fact guaranteed. Here, the district court correctly found that the evidence was sufficient for the jury to conclude that petitioner "believed at the time * * * that the General Counsel's negative recommendation was the reason the Commitment was not going forward," Pet. App. 85a, and that, "if the General Counsel changed his recommendation to approve the Commitment, it would set into motion a series of events by which the [Fund's] assets would be invested through FA Technologies as had been done in the past," *id.* at 86a. That fact-specific determination does not warrant the Court's review.

e. Petitioner also argues that the court of appeals erroneously "sanctioned the District Court's constructive amendment of the indictment by converting the property that was the subject of the charge from the 'General Counsel's recommendation to approve the Commitment' into the General Counsel's 'right to make a recommendation.'" Pet. 12; see Pet. 17. That is incorrect. The indictment specifically alleged that petitioner "attempt[ed] to obtain * * * the General Counsel's recommendation to approve the Commitment, with the General Counsel's consent, induced by threatening to disclose the General Counsel's alleged extramarital affair." C.A. App. 23. Obtaining the General Counsel's recommendation through blackmail necessarily entailed the General Counsel's right to make a recommendation —the former naturally encompasses the latter. See

United States v. *LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002) ("An indictment must be read to include facts which are necessarily implied by the specific allegations made.").

f. Petitioner also relies on this Court's decision in *Cleveland* v. *United States*, 531 U.S. 12 (2000), arguing (Pet. 23-26) that the court of appeals erred in holding that the Hobbs Act does not require that "a property right * * * be a source of wealth to the target of the extortion." Pet. App. 9a. In *Cleveland*, the Court held that the State of Louisiana's ability to grant a video poker license was not "property" within the meaning of the federal mail fraud statute because the State's interest in that ability was a regulatory interest, not a property interest. 531 U.S. at 20-26. *Cleveland* does not assist petitioner. Petitioner focuses on the court of appeals' statement, in the alternative, that "a property right need not be a source of wealth to the target of the extortion." Pet. App. 9a. But that statement cannot warrant this Court's review because the court of appeals' primary holding, just one sentence earlier in the opinion, was that the General Counsel's right to make legal recommendations free from threats "can be seen as a 'source or element of wealth' for the General Counsel." *Ibid.* That holding rests on the basic principle that a lawyer's professional worth rests on his ability to render independent advice. And that holding is sufficient to support the judgment. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statement in opinions."). In any event, the General Counsel's right to make legal recommendations based on his own independent legal judgment is not at all akin to the State's regulatory right over video poker at issue in *Cleveland*. The General Counsel's right to

render independent legal advice—his "stock in trade" (Pet. App. 8a)—is a source of personal wealth, not a regulatory power of the government over citizens, as in *Cleveland*.

2. Petitioner's argument (Pet. 14-18) that the court of appeals' decision conflicts with this Court's decision in *Scheidler*, *supra*, lacks merit. The Court in *Scheidler* considered whether a group of protesters violated the Hobbs Act by engaging in a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity that included acts of alleged extortion. See 537 U.S. at 397-398. Although the Court found "no dispute * * * that [the protesters had] interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights," *id.* at 404, the Court concluded that the protestors' conduct did not qualify as extortion under the Hobbs Act because the protesters did not "obtain" the clinic's property, *id.* at 409. Here, in contrast, if petitioner had succeeded in his extortion attempt, he would have obtained the very property he sought—the General Counsel's favorable recommendation. The decision in *Scheidler* therefore does not conflict with the Second Circuit's decision here.

Petitioner focuses (Pet. 19) on the *Scheidler* Court's distinction between extortion and coercion, 537 U.S. at 405-406, arguing that his conduct qualified only as coercion, which is not prohibited by the Hobbs Act. The Court in *Scheidler* defined coercion as "the use of force or threat of force to restrict another's freedom of action," without necessarily obtaining property. *Id.* at 405. The Court also noted that "coercion and extortion certainly overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property."

Id. at 407-408. Unlike *Scheidler* and the other cases on which petitioner relies (see Pet. 19 (citing *People* v. *Ginsberg*, 188 N.E. 62 (N.Y. 1933); *People* v. *Scotti*, 195 N.E. 162 (N.Y. 1934); *People* v. *Kaplan*, 269 N.Y.S. 161 (N.Y. App. Div. 1934)), this case involves the additional ingredient that separates extortion from coercion—*i.e.*, the pursuit or receipt of the victim's property rights. *Id.* at 405.

3. Finally, petitioner errs in contending (Pet. 13, 29-30) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *United States* v. *McFall*, 558 F.3d 951 (2009). The defendant in that case was a lobbyist who was convicted of attempted extortion under the Hobbs Act for attempting to use his political influence to prevent a competitor of his client from bidding on a contract. *Id.* at 953-955. The court of appeals held that the evidence failed to establish a violation of the Hobbs Act because merely "decreasing a competitor's chance of winning a contract, standing alone, does not amount to *obtaining* a transferrable asset for oneself (or one's client)." *Id.* at 957. The court distinguished the Second Circuit's decision in *Tropiano*, explaining that, "[e]ven assuming that the intangible right to bid on a [contract] constitutes property for Hobbs Act purposes, the government must establish that [the defendant] attempted to acquire that property right such that he alone could sell, transfer, or exercise it." *Ibid.* The Ninth Circuit found that the defendant had not done so in that case; rather, the defendant merely "sought to increase [his client's] odds of prevailing in its own bid by restricting the activities of a competitor—conduct that cannot amount to obtaining under *Scheidler*." *Id.* at 958.

Petitioner's case is materially different from *McFall*. As the court of appeals correctly concluded, petitioner

did attempt to exercise for himself the General Counsel's right to make a recommendation about whether to invest in petitioner's fund "by forcing the General Counsel to make a recommendation determined by [petitioner]." Pet. App. 12a. He, accordingly, did seek to "obtain" that right. The Ninth Circuit's holding in *McFall* that property is not "obtained" when a competitor seeks to drive his rival from the field (and will not exercise that rival's right to submit a bid) thus provides no reason to believe that petitioner's appeal would have resulted in a different outcome if it had been brought in the Ninth Circuit. In the absence of a conflict, this Court's intervention to review the application of extortion principles to the unique facts of this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2012

REPLY BRIEF

SUPREME COURT, U.S.
FILED
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OFFICE OF THE CLERK

No. 12-357

IN THE
Supreme Court of the United States

GIRIDHAR C. SEKHAR,

Petitioner,

-v.-

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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18 U.S.C. §875(d) 4

29 U.S.C. § 401, Sections 401 and 481 (the Labor Management Reporting Disclosure Act "LMRDA") 11, 12

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Reply Brief in Support of Petition for a Writ of Certiorari

1. The Property in Question is the "Recommendation by a Salaried Employee of a Governmental Agency, in a Single Instance" and not Investment Monies or a Contract

Throughout its reply brief, the Government tempts the Court to forget that the property that the petitioner was charged with attempting to obtain was the "General Counsel's Recommendation to Approve the Commitment," and nothing more. The Government did not indict the petitioner for attempting to extort management fees (Br. Opp. 3) or for putting into motion a series of events by which the pension fund's assets would be invested in FA Technology Ventures (Br. Opp. 14). Indeed, at a conference before the Court's charge to the jury, the Government specifically stated that the petitioner was not charged with attempting to obtain pension fund assets, but rather was charged with attempting to obtain a recommendation from the General Counsel.

The Government's decision to not indict the petitioner for an investment contract or management fees was sensible given the evidence adduced at trial. The e-mails never demanded money or a contract. The proof established that the alleged victim, Mr. Bierman, had no role in the approval of investments and had only advised on an investment decision one other time in his career. FA Tech Ventures was far removed from an investment contract. Viewing the evidence in the light most favorable to the Government, the Government proved what it

pleaded; that what the petitioner sought to obtain was a recommendation from the General Counsel.

The Government is unable to argue that the petitioner could sell, transfer, or exercise a recommendation for money. Instead, the Government persists in its shape-shifting property theory, where the property is not the thing pleaded in the indictment, but rather the right to do or not do something and a forced exercise of the right. The Government further invites the Court to ignore the purported obtaining of something from the General Counsel (a recommendation), and speculate upon the potential downstream consequences, obtained from someone else, of a changed recommendation (Br. Opp. 14) The Government claims that it is a "fact-specific" determination that the petitioner's state of mind was that he "believed that such control (over a recommendation) would yield an investment." (Br. Opp. 14). Such a statement is absurd and misleading. There was no finding of fact by the jury relating to investments or money. The Government's attempt to re-diagram the alleged offense and now claim that the property value to the petitioner comes from investment funds, 1) operates to constructively amend the indictment, and 2) is contrary to the plain language of the Hobbs Act.

"Ever since *Ex-Parte Bain*, 121 U. S. 1. was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 217 (1960). Given that the petitioner was not indicted for extorting investment monies or a contract and there was no finding of fact by the jury

on the matter, the Government's argument is reduced to the deduction that the petitioner had a financial motive to act.

However, "hardly any part of penal law is more definitely settled than that *motive is irrelevant*" (Professor James Hall, *General Principles Of Criminal Law* 88 (2d ed. 1960) (emphasis added) (citing *State v. Logan*, 126 S.W.2d 256 (Mo. 1939) (per curiam)). As demonstrated infra., according to case law cited by the Court in *Scheidler v. National Organization For Women, Inc.*, 537 U.S. 393, 405-6 (2003)), it is possible for a coercive threat to have a financial motive and still be deemed a coercion, not an extortion.

Moreover, the plain language of the Hobbs Act requires that the defendant obtain property *from another, with his consent.* The property that is the subject of the extortion must be obtained from the victim of the threats. The fact the person making the threats may ultimately realize a financial gain from his coercive act does not establish that the defendant obtained "property" from the victim.

The property question to be analyzed in this case must stop at the four corners of the indictment. In determining whether the property in question can be sold, transferred, or exercised (*Scheidler II at 405*) and is a "source of wealth" (*United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969) *cert. denied* 397 U.S. 1021 (1970)), the inquiry must be restricted to the item that the petitioner was indicted and convicted on. The question addressed should be that presented by the petitioner:

Whether the "recommendation" of an attorney, who is a salaried employee of a governmental agency, in a single instance, is intangible property that can be the subject of an extortion attempt under 18 U.S.C. §1951(a)(the Hobbs Act) and 18 U.S.C. §875(d).

2. The Court Should Grant Certiorari to Resolve the Conflicts with *Scheidler* and Define the Outer Boundaries of Intangible Property

The Government claims that the petitioner has demonstrated no conflict with *Scheidler II* (Opp. Br. 16). *Scheidler II* clearly demarcated the crime of extortion, from the lesser, non-federal crime of coercion. Compelling another to change a recommendation clearly falls within the *Scheidler II* definition of coercion, "the use of force or threat of force to restrict another's freedom of action." *Scheidler II* at 405. The making of a recommendation is an action, and forcing a person to change a recommendation is a restriction on their freedom of action.

The Government claims (Opp. Br. 17). that the instant case is unlike the examples of business coercions cited by *Scheidler* at 405, 406. Contrary to this assertion, these cases are parallel to the instant case, and serve as illustrations to how the Court intended to differentiate between coercion and extortion. Each of the cases involves the coercion of a business with a clear financial motive, but without the obtaining of property necessary to support a conviction for extortion. [*People v. Ginsberg*, 262 N.Y. 556 (1933), a coercion conviction was affirmed

based on the defendant's threats to injure the victim's property if the victim store owner did not become a member of local trade association and remove certain signs from his store windows. In *People v. Scotti*, 266 N.Y. 480 (1934), defendants were found guilty of coercion for compelling the victim manufacturers, through threats and force, into entering agreements with labor unions. And in *People v. Kaplan*, 240 A.D. 72 (N.Y. App. Div. 1934), coercion was established where defendants had used violence and retaliatory activity (expelling victims from a labor union) to compel the victims into dropping certain lawsuits.] This Court noted in *Scheidler II* that at the time Congress passed the Hobbs Act, it was based on the New York extortion statute, and further noted that at that time, coercion was clearly defined in the New York Penal Code as a separate, lesser offense.

The decision below clearly conflicts with *Scheidler II's* requirement that property be something that can be sold, transferred, or exercised. The Government, unable to argue that a recommendation can be sold or transferred, recasts the "recommendation" as a "right to make a recommendation" and then concocts the concept of a "simultaneous" acquisition and exercise of that right by the petitioner. (Opp. Br. 13) Under this concept of simultaneous exercise, any and every action in the universe becomes an exercisable right. Under the simultaneous exercise theory, the *Scheidler II* petitioners could have been held to have acquired the abortion clinics "right to use its property free from outside threats" and simultaneously exercising that right by forcing the clinic to put the property into disuse.

The Second Circuit has, in the instant case, discovered a curious new species of intangible property - a property that cannot be sold, transferred, or exercised; confers no legal or enforceable rights upon its holder; and has no vested monetary value in the present or the future to either the victim or the obtainer. The Second Circuit made the astonishing pronouncement that the purported property right need not be a source of wealth to the target of an extortion. (Pet. App. 12a, 13a). According to the Government, this property right need not be a direct source of wealth to the petitioner, but derives its value from other events that the petitioner believes might occur if they are "set in motion." (Opp. Br. 14).

The Court in *Scheidler* declined to address the outer limits of intangible property. "We need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets."[1] *Scheidler* at 402. The instant case stakes new ground in the outward expansion of the perimeters of intangible property.

The court should grant certiorari to settle this important question of federal law.

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[1] *Scheidler* at 402 (emphasis added) reiterates this point stating, "Accordingly, the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States* v. *Tropiano*... " The Government selectively edits this quotation in its brief, leaving out the important statement that *Scheidler* does not "reach" a decision on *Tropiano*. (Opp. Br. 11 footnote 1).

3. A Recommendation Does not Provide a Revenue Stream and Speculation On Downstream Opportunities is in Conflict with the 9th Circuit's Decision in *United States v. McFall*

The Government states that the "Petitioner does not explain how the facts of this case do not involve business decisions implicating a revenue stream..." (Opp. Br. 11) For the benefit of the Government and the Court, Petitioner will explain how this case does not involve a revenue stream from the victim to another person.

As previously noted, the plain language of the Hobbs Act requires that the defendant obtain property *from another, with his consent.* The property that is the subject of the extortion must be obtained from the victim of the threats. Nothing of any objective pecuniary value belonging to the General Counsel was diverted from the General Counsel to the petitioner or another person. The General Counsel was a salaried government employee. The making of a single recommendation has no impact on his income one way or the other. The petitioner was not indicted or convicted of depriving the General Counsel of his right to practice law or make other recommendations. The act of making a recommendation by the General Counsel in a single instance is not a "product that a lawyer sells," (Opp. Br. 11) as if he were a fortune teller who charges by the palm. A recommendation is not "stock in trade" which this Court has held to be "actual inventory, property held for sale to customers or depreciable property used in a trade or business." *Corn Products Refining Co. v. Commissioner of*

Internal Revenue, 350 U.S. 46, 51-52 (1955). There was no proof adduced at trial as to the rate at which the General Counsel was compensated per recommendation. The Government's slang-like use of the phrase "stock in trade" artificially imbues a recommendation with the properties of a transferrable commodity. The Government's reliance upon *Carpenter v. United States*, 484 U.S. 19 (1987) (Opp. Br. 10) is misplaced, because the property in question in *Carpenter* was the confidential news content gathered by a newspaper that could be transferred and sold to other news outlets.

Similarly, a recommendation is not a source of wealth to the petitioner. He cannot possess the recommendation, and cannot transfer or sell it. The Government joins with the Second Circuit to mis-diagram the property in question, asking it to draw a line further out to speculative amounts of investment monies. In the words of the Second Circuit, "opportunities have value" (Pet. App. 13a) which is very different from saying that "a recommendation has value," the finding which is required to affirm the verdict. As discussed supra., the property to be analyzed and the monetary value to be discovered must be vested in the recommendation, not in potential downstream opportunities.

This same analysis was specifically rejected by the Ninth Circuit in *United States v. McFall*, 558 F.3d 951, 957 (9th Cir. 2009) where it was held that obtaining a speculative advantage by coercing a competitor from bidding a job is not extortion under the Hobbs Act:

> "The district court concluded that McFall's 'improper attempt to secure a business advantage' satisfied the Hobbs Act's obtaining element, but this formulation *fails to account for Scheidler's principal point*: To violate the Hobbs Act, an alleged extortionist must actually appropriate (or attempt to appropriate) the victim's property such that it can be exercised, transferred or sold. [Schediler]. at 405, 123 S.Ct. 1057. *It is not enough to gain some speculative benefit* by hindering a competitor." (emphasis added)

The Government is incorrect to assert that there is no conflict with *McFall* (Opp. Br. 17), a disagreement which was acknowledged by the Second Circuit. *United States v. Cain*, 671 F.3d 271, 283 n.4 (2d Cir. 2012) (Pet. App. 13A). Just as in *McFall*, the purported monetary value of the recommendation is derived entirely from speculative benefits.

4. The Government is Unable to Present any Law to Support the Claim that the "Right to Make Business Decisions Free from Outside Threats" is Extortable Property

The Government makes the dubious claim that the Courts of Appeals have "uniformly held at the right to make business decisions free from outside threats may constitute property," (Opp. Br. 10 footnote; 11-12) and yet the Government can point to no cases outside of the Second Circuit, which were decided post-*Scheidler II*, in which the underlying extorted property was not money. The Government's

case citations break generally out into three categories:

(i) Abortion protest cases which do not survive *Scheidler* The Government cites to *United States v. Arena,* 180 F.3d 380 (2d Cir. 1999), which *Scheidler* specifically cited as having too expansive a definition for the obtaining of property. *Scheidler II* at 403, footnote 8.[2] *Arena* and similar cases cannot be held to survive *Scheidler* .

(ii) Cases Where the Underlying Property is Money. The government presents several cases as standing for the "right to do business free from outside threats" as property, without candidly disclosing the underlying facts of these cases, each of which were classic extortions where the item demanded was money. These include *United States v. Vigil,* 523 F.3d 1258 (10th Cir. 2008), cert. denied, 555 U.S. 886 (2008) (public official forcing the victim to hire a specific employee and pay the employee 40% percentage of anticipated revenue from a contract as a condition of getting the contract); *United States v. Lewis,* 797 F.2d 358 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987) (A threat to poison Tylenol capsules if a $1 million bounty is not paid); *United States v. Santoni,* 585 F.2d 667 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979) (public officials required contractors to kick back a percentage of their contract fees to in exchange for assurances of future contracts and the evasion of inspections); *United*

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[2] The Government also cites *Libertad v. Welch,* 53 F.3D 428, 444 N.13 (1st Cir. 1995); *Northeast Women's Ctr, Inc. v. McMonagle* 868 F.2D 1342, 1350 (3d Cir.), Cert. Denied, 493 U.S. 901 (1989)

States v. Zemek, 634 F.2d 1159 (9th Cir. 1980), cert. denied, 450 U.S. 916, and 452 U.S. 905 (1981), (extortion of money under the threat of violence); *United States v. Stephens*, 964 F.2d 424 (5th Cir. 1992) (conspiring with members of a police department to extort money from travelers passing through the town, in exchange for the dismissal or reduction of DWI charges);

(iii) Second Circuit Cases with Inflated Definitions of Intangible Property. The Government also cites *United States v. Gotti*, 459 F.3d 296 (2d. Cir. 2006) cert. denied 551 U.S. 1144 (2007). The Second Circuit has emerged as the source of intangible rights inflation, viewing itself seemingly immune from the dictates of this Court's decision in *Scheidler*. The Second Circuit is originator of intangible rights as property in *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969) *cert. denied*, 397 U.S. 1021 (1970). The intangible property acquired in *Tropiano* was a non-competition agreement that was a legally enforceable, transferable asset and was ultimately valued when the business was sold.

In the past decade, the Second Circuit has expanded the boundaries of intangible property to include "the right of [ ] union members to free speech and democratic participation in the affairs of their labor organization as guaranteed by [Sections 411 and 481 of the Labor-Management Reporting Disclosure Act ("LMRDA"), 29 U.S.C. § 401 et seq.];" *Gotti* at 302. See also See *United States v. Muscarella*, 2004 U.S. Dist. LEXIS 19476, No. 03 CR. 229, 2004 WL 2186561, at * 6 (S.D.N.Y. Sept. 28, 2004); *United States v. Cacace*, No. 03 CR. 0072,

2004 WL 1646760 at * 2-*3 (E.D.N.Y. July 14, 2004). cf. *United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1990);

The concept of "free speech rights" and "democratic participation" as property surely tests the limits of common sense, places strains upon the English language, and erases any distinction between property and liberty interests. As vague and expansive as the alleged property in *Gotti* and its kindred are, the case is still narrower than the instant case because the "free speech" and "democratic participation" rights are conferred and protected by the LMRDA statute and therefore it is possible to *exercise* those rights in a legal sense. To the contrary, the alleged property in the instant case – a recommendation – is not protected by statute and cannot be exercised in the legal sense.

5. Conclusion

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 25 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 12-357

In the
Supreme Court of the United States

GIRIDHAR C. SEKHAR,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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February 25, 2013

Petition for Writ of Certiorari Filed Sept. 19, 2012
Petition for Writ of Certiorari Granted Jan. 11, 2013

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E-mail from Luke Bierman, General Counsel, NYS Office of the State Comptroller, to NYEthics (Nov. 20, 2009, 3:05 PM) ..... JA 67

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Decision of the Court of Appeals for the Second Circuit Entered June 26, 2012, Affirming the Judgment of Conviction Entered in the United States District Court for the Northern District of New York .....Pet. App. 1a

Decision and Order of the United States District Court for the Northern District of New York Entered March 28, 2011, Denying Defendant's Motion to Dismiss the Indictment as Facially Insufficient.....Pet. App. 14a

Decision and Order of the United
States District Court for the
Northern District of New York
Entered July 26, 2011, Denying
Defendant's Motions for a Judgment
of Acquittal and a New Trial.....Pet. App. 67a

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

No. 1:10-cr-00573-TJM-1

UNITED STATES OF AMERICA

v.

GIRIDHAR SEKHAR

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
10/22/2010	1	COMPLAINT as to Giridhar C. Sekhar (1). (dpk) [1:10-mj-00524-DRH] (Entered: 10/22/2010)
10/28/2010		Text Minute Entry (FTR Recorded: 1:38PM-1:45PM) for proceedings held before Magistrate Judge David R. Homer: Detention Hearing and Initial Appearance as to Giridhar C. Sekhar held on 10/28/2010. Appearances: AUSA Tina Sciocchetti for Gov't; William Dreyer, Esq. for defendant. Defendant advised of rights, maximum penalty and received copy of Complaint. Order Setting

Date Filed	#	Docket Text
		Conditions issued. Added attorney William J. Dreyer for Giridhar C. Sekhar. (Preliminary Examination set for 11/15/2010 at 1:30 PM in Albany before Magistrate Judge David R. Homer.) (CRD: S. Gunter) (sg) [1:10-mj-00524-DRH] (Entered: 10/28/2010)
10/28/2010	3	ORDER Setting Conditions of Release as to Giridhar Sekhar. Signed by Magistrate Judge David R. Homer on 10/28/2010. (sg) [1:10-mj-00524-DRH] (Entered: 10/28/2010)
11/09/2010	4	STIPULATION/ORDER TO CONTINUE - Ends of Justice as to Giridhar C. Sekhar Time excluded from 11/8/10 until 12/8/10. Preliminary hearing waived. Signed by Magistrate Judge David R. Homer on 11/8/10. (tab) [1:10-mj-00524-DRH] (Entered: 11/09/2010)
		* * *
12/03/2010	6	INDICTMENT as to Giridhar C. Sekhar (1) count(s) 1 and 2-7. (mab) (Entered: 12/03/2010)

Date Filed	#	Docket Text
		* * *
12/10/2010		Reset Hearings as to Giridhar C. Sekhar: Arraignment set for 12/13/2010 02:00 PM in Albany before Magistrate Judge Randolph F. Treece. (rzh,) (Entered: 12/10/2010)
12/13/2010		TEXT Minute Entry for proceedings held before Magistrate Judge George H. Lowe: Arraignment as to Giridhar C. Sekhar (1) Count 1, 2-7 held on 12/13/2010. Appearances: William Pericak, AUSA for the United States; William Dreyer, Esq. for Defendant. Defendant appears with counsel, maximum penalties stated on the record. Defendant waives a formal reading of the Indictment and pleads not guilty, a scheduling order will be issued. Attorney Dreyer requests leave to withdraw as counsel, request granted. Defendant informs the Court that he would like to proceed pro se and requests stand by counsel for trial. Financial affidavit is submitted. Court

Date Filed	#	Docket Text
		recesses from 1:45 PM to 2:30 PM. 2:30 PM - Court is back in session. Judge Lowe reviews the financial affidavit and determines that Defendant is not eligible for assignment of stand by counsel at this time. Judge Lowe hears from AUSA Pericak regarding Defendant proceeding pro se. Defendant is sworn in by Clerk and Judge Lowe conducts a colloquy of Defendant. Judge Lowe finds that Defendant's waiver of counsel is knowing and voluntary. Defendant requests permission to file electronically Judge Lowe reserves on this and will confer with the Clerk of Court. Defendant requests a "building pass" to bring his electronics into Court Judge Lowe advises Defendant that this can be addressed at the final pretrial conference. Defendant requests permission to file oversized briefs and motions - Judge Lowe advises Defendant to make this request to Judge McAvoy. Defendant is

Date Filed	#	Docket Text
		continued on release. (FTR Recorded (FTR Cart)) (rjb,) (Entered: 12/13/2010)
12/13/2010		Attorney update in case as to Giridhar C. Sekhar. Attorney William J. Dreyer terminated. (rjb,) (Entered: 12/13/2010)
12/13/2010	7	CRIMINAL PRETRIAL SCHEDULING ORDER as to Giridhar C. Sekhar: Motions to be filed by 1/10/2011; Jury Trial set for 2/7/2011 at 10:00 AM in Binghamton before Senior Judge Thomas J. McAvoy. Signed by Magistrate Judge George H. Lowe on 12/13/10. (rjb,) (Entered: 12/13/2010)
12/20/2010	8	MOTION for Electronic Filing Privileges, Courtroom IT and AV Privileges, Memo of Law enlargement, Court Appointed Stand-by Counsel and IFP by Giridhar C. Sekhar. (Attachments: #1 Envelope) (sfp,) (Entered: 12/20/2010)

Date Filed	#	Docket Text
12/20/2010		COURT'S TEXT NOTICE OF HEARING ON MOTION: Defendant, Giridhar C. Sekhar's 8 MOTION for Omnibus Relief is placed on Judge McAvoy's 1/28/11 Motion Calendar at 10 AM in Binghamton. Response to Motion due by 1/11/2011. [Clerk served by mail upon defendant.] (sfp,) (Entered: 12/20/2010)
12/22/2010		TEXT ORDER as to Giridhar C. Sekhar: Upon further consideration of Defendant's request for the appointment of stand by counsel, the Court directs that the Federal Public Defender ("FPD") is to be appointed as such counsel. The FPD is to maintain a record of time expended and services rendered on behalf of Defendant. At the conclusion of this matter the Defendant will be billed for such time and services. SO ORDERED by Magistrate Judge George H. Lowe on 12/22/10 (text order served on Defendant via regular mail). (rjb,) (Entered: 12/22/2010)

Date Filed	#	Docket Text
12/22/2010	9	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as Stand by counsel for Giridhar C. Sekhar. Signed by Magistrate Judge George H. Lowe on 12/22/10 (order served on Defendant via regular mail). (rjb,) Modified on 12/22/2010 (rjb,). (Entered: 12/22/2010)
12/23/2010	10	Letter from Giridhar C. Sekhar requesting immediate relief re: his 8 Motion. (sfp,) (Entered: 12/23/2010)
12/28/2010	11	Receipt for Surrender of Passport (#1132) as to Giridhar C. Sekhar Passport Number #105345191 issued by USA, placed in vault in Albany, NY Clerk's. (tab) (Entered: 12/28/2010)
01/05/2011	12	DECISION AND ORDER granting in part denying in part Deft, Giridhar C. Sekhar's 8 motion. The motion for electronic filing privileges is granted subject to the conditions stated herein, the motion to bring in electronic devices is denied with leave to renew, the

Date Filed	#	Docket Text
		motion for page limit extensions is denied in part and granted in part consistent with this Order, the motion for the appt of standby counsel is denied as moot, and the request concerning the adjournment of the trial date is denied. Signed by Senior Judge Thomas J. McAvoy on 1/5/11. [Served deft by mail.] (sfp,) (Entered: 01/05/2011)
01/10/2011	13	DEFENSE MOTION for Omnibus Relief by Giridhar C. Sekhar for Suppression of Statements and/or Evidence Seized, Dismissal of Indictment & Compel Discovery & Brady Material. MOTION HEARING set for 2/14/2011 at 10:00 AM in ALBANY, NY bef Sr. District Judge Thomas J. McAvoy; and, setting Govt Response to Motion due by 1/28/2011; and, setting, Defense Reply Response to Motion upon Court leave due by 2/03/2011. (Attachments: #1 Affidavit of Giridhar Sekhar, #2 Affidavit of Paul A. Clyne, #3 Memo/Law in Support of

Date Filed	#	Docket Text
		Suppression, #4 Memo/Law in Support of Dismissal, #5 Memo/Law in Support of Discovery, #6 Appendix A - State Mapp-Huntley transcript, #7 Appendix B Dec 3 Brookline Search Warrant, #8 Appendix B-1 - Dec 3 Brookline Affidavit, #9 Appendix B-2 - McDonnell Search Warrant Narrative, #10 Appendix B-3 - Emails referenced by McDonnell, #11 Appendix C - Feb Albany Search Warrant, #12 Appendix C-1 - Feb Albany Affidavit, #13 Appendix D - June 21 Search Warrant, #14 Appendix D-1 - June 1 Albany Affidavit, #15 Appendix D-2 - FBI Property Receipt, #16 Appendix E - NY Charges, #17 Appendix E-1 - Summary of Oral Statements, #18 Appendix E-2 - Judge Lamont Omnibus Ruling, #19 Appendix E-3 Gallarnau Dismissal papers, #20 Appendix E-4 - Demand to Produce Brady Material in State case, #21 Appendix F - Federal Discovery Cover Letter) (cml) (Entered:

Date Filed	#	Docket Text
		01/11/2011)
01/11/2011		TEXT ONLY NOTICE as to Giridhar C. Sekhar resetting JURY TRIAL for 3/15/2011 at 10:00 AM in ALBANY, NY bef Sr. District Judge Thomas J. McAvoy. Parties are directed to be present at the courthouse at least 1/2 hour in advance of trial commencement. (cml) (Entered: 01/11/2011)
01/12/2011		CRD updated atty in case of Giridhar C. Sekhar -- AFPD Gene Primomo appted as Stand-by Counsel in accordance w/ MJ Lowe's 9 Order & 12/22/2010 Text order (cml) (Entered: 01/12/2011)
01/14/2011	14	MOTION to Proceed Ex Parte on Early Return Subpoena Applications and for the Authentication of Certain Public Records Received by Subpoena by Giridhar C. Sekhar. (Attachments: #1 Memorandum of Law) (Sekhar, Giridhar) (Entered: 01/14/2011)

Date Filed	#	Docket Text
01/21/2011	15	DECISION AND ORDER Deft, Giridhar C. Sekhar's 14 Motion is placed on Judge McAvoy's 2/14/11 motion calendar at 10 AM in Albany. Govt has an opportunity to respond by 1/28/2011. Signed by Senior Judge Thomas J. McAvoy on 1/21/11. (sfp,) (Entered: 01/21/2011)
01/28/2011	16	RESPONSE in Opposition by USA as to Giridhar C. Sekhar re 13 MOTION for Omnibus Relief (Attachments: #1 Affidavit of First Assistant U.S. Attorney Grant C. Jaquith, #2 Affidavit of Assistant U.S. Attorney Tina E. Sciocchetti) (Coombe, Elizabeth) (Entered: 01/28/2011)
01/28/2011	17	MOTION to File 35-Page Omnibus Opposition to Defendant's Motions by USA as to Giridhar C. Sekhar. (Coombe, Elizabeth) (Entered: 01/28/2011)

Date Filed	#	Docket Text
01/28/2011	20	Minute Entry: MOTION CALENDAR as to Giridhar C. Sekhar held 1/28/2011 bef Sr. District Judge Thomas J. McAvoy in Binghamton, NY: APP/CR/CRD: None; LC/SE. Deft Sekhar's 8 MOTION for Omnibus Relief - TAKEN ON SUBMIT [addressed by TJM 12 order]. (cml) (Entered: 02/01/2011)
01/29/2011	18	MOTION for Protective Order by USA as to Giridhar C. Sekhar. (Coombe, Elizabeth) (Entered: 01/29/2011)
01/31/2011		TEXT ORDER granting Govt's 17 Motion to file 35 page memo of law as to Giridhar C. Sekhar pending motions. Authorized by Honorable Thomas J. McAvoy on 1/31/11. (sfp,) (Entered: 01/31/2011)
01/31/2011	19	PROTECTIVE ORDER granting Govt's 18 Motion for Protective Order as to Giridhar C. Sekhar. Signed by Senior Judge Thomas J. McAvoy on 1/31/11. (sfp,) (Entered: 01/31/2011)

Date Filed	#	Docket Text
02/02/2011	21	Letter Request / Motion for Leave to File *Reply in Support of Defense Pretrial Omnibus Motions* by Giridhar C. Sekhar. Motion Hearing set for 2/14/2011 10:00 AM in Albany before Senior Judge Thomas J. McAvoy Response to Motion due by 1/28/2011 Reply to Response to Motion due by 2/3/2011. (Sekhar, Giridhar) Modified on 2/10/2011 to reflect this is a letter request (sfp,). (Entered: 02/02/2011)
02/02/2011	22	REPLY TO RESPONSE to Motion by Giridhar C. Sekhar re 13 MOTION for Omnibus Relief *in Support of Defense Motion to Dismiss* (Sekhar, Giridhar) (Entered: 02/02/2011)
02/02/2011	23	REPLY TO RESPONSE to Motion by Giridhar C. Sekhar re 13 MOTION for Omnibus Relief in Support of Defense Motion to Suppress (Sekhar, Giridhar) (Entered: 02/02/2011)

Date Filed	#	Docket Text
02/08/2011		COURT'S TEXT NOTICE to parties advising that the pending motions for 2/14/11 are on submit basis, no appearances necessary. [Served this text notice upon Giridhar C. Sekhar by mail.] (sfp,) (Entered: 02/08/2011)
02/10/2011		COURT'S TEXT ORDER granting Defendant, Giridhar C. Sekhar's 21 Letter Request/Motion for Leave to File reply. (sfp,) (Entered: 02/10/2011)
02/14/2011	24	Minute Entry: MOTION CALENDAR as to Giridhar C. Sekhar held 2/14/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: None; CR: L. Tennyson; LC/JC; CRD/mp. Deft's 13 MOTION for Omnibus Relief & 14 MOTION Proceed Ex Parte on Early Return Subpoena Applications and for the Authentication of Certain Public Records Received by Subpoena - TAKEN ON SUBMIT. (cml) (Entered: 02/16/2011)

Date Filed	#	Docket Text
03/04/2011	25	MOTION to Continue - *Interests of Justice* by Giridhar C. Sekhar. (Attachments: #1 Proposed Order/Judgment, #2 Affidavit) (Sekhar, Giridhar) (Entered: 03/04/2011)
03/04/2011	26	SEALED DOCUMENT Deft Sekhar's Letter Request dtd 3/03/11 re: issuance of trial subpoenas - maintained in Clerk's Office & not available for electronic viewing (cml) (Entered: 03/08/2011)
03/04/2011	27	ORDER sealing deft's 26 document; Signed by Sr. District Judge Thomas J. McAvoy dtd 3/04/2011 (cml) (Entered: 03/08/2011)
03/11/2011		TEXT ONLY NOTICE as to Giridhar C. Sekhar resetting JURY TRIAL for 4/12/2011 at 10:00 AM in ALBANY, NY bef Sr. District Judge Thomas J. McAvoy. Parties are to be present at the courthouse by 9:30 A.M. Parties are directed to send their jury instructions & proposed verdict sheet in TEXT format (i.e., WordPerfect or Word, but not

Date Filed	#	Docket Text
		.pdf format) to Sr. Judge McAvoy's electronic mail box at: NYND_TJM_ECF_NOTICES @nynd.uscourts.gov. The Court further directs the Govt to also electronically send the Indictment in TEXT format. (cml) (Entered: 03/11/2011)
03/25/2011	28	MOTION to Quash *Subpoenas Duces Tecum* by USA as to Giridhar C. Sekhar. (Coombe, Elizabeth) (Additional attachment(s) added on 3/29/2011: #1 Subpoenas to Testify and for Duces Tecum), Subpoenas added as directed by the Court (wbl,). (Entered: 03/25/2011)
03/28/2011		TEXT ORDER directing the government to file copies of the subpoenas it seeks to quash in regards to 28 Motion to Quash Subpoenas. Defendant is directed to file opposition, if any, by 10 AM on April 4, 2011. Authorized by Honorable Thomas J. McAvoy on 3/28/11. (sfp,) (Entered: 03/28/2011)

Date Filed	#	Docket Text
03/28/2011		Set Deadlines re 28 MOTION to Quash Subpoenas. Defendant's Response to Motion due by 4/4/2011. Pursuant to 3/28/11 Text Order. (sfp,) (Entered: 03/28/2011)
03/28/2011	29	DECISION AND ORDER Deft's 13 Motion for Omnibus Relief is denied in all respects except to the extent that defendant seeks to suppress his statements made to police on 12/3/09, on which issue the Court RESERVES decision and will hold an evidentiary hearing immediately before the commencement of trial. Signed by Senior Judge Thomas J. McAvoy on 3/28/11. (sfp,) (Entered: 03/28/2011)
03/29/2011	30	Letter from Nelson R. Sheingold as to Giridhar C. Sekhar requesting informing the Court that the Office of the New York State Comptroller joins in the Government's Motion to Quash as such pertains to materials in the custody of the Comptroller's office

Date Filed	#	Docket Text
		(Attachments: #1 Exhibit(s) Notice of Appearance on Behlaf of the Office of the New York State Comptroller) (Sheingold, Nelson) (Entered: 03/29/2011)
04/02/2011	31	Court Ordered Questionnaire as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/02/2011)
04/02/2011	32	EXHIBIT LIST by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/02/2011)
04/02/2011	33	Proposed Jury Instructions by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/02/2011)
04/02/2011	34	PROPOSED VERDICT FORM by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/02/2011)
04/02/2011	35	Proposed Voir Dire by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/02/2011)

Date Filed	#	Docket Text
04/02/2011	36	TRIAL BRIEF by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/02/2011)
04/02/2011	37	WITNESS LIST by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/02/2011)
04/04/2011		TEXT ONLY NOTICE as to Giridhar C. Sekhar setting EVIDENTIARY / SUPPRESSION HEARING for 4/12/2011 at 9:30 AM in ALBANY, NY bef Sr. District Judge Thomas J. McAvoy. JURY SELECTION shall follow thereafter commencing at 1:30 P.M. (cml) (Entered: 04/04/2011)
04/04/2011		TEXT ONLY NOTICE as to Giridhar C. Sekhar setting PRETRIAL CONFERENCE for 4/11/2011 at 4:00 PM in ALBANY, NY bef Sr. District Judge Thomas J. McAvoy (cml) (Entered: 04/04/2011)

Date Filed	#	Docket Text
04/04/2011	38	DECISION AND ORDER denying as moot the portion of 14 Motion seeking leave to proceed ex parte on applications for the early return of information subpoenaed pursuant to Fed. R. Crim. P. 17(c). That portion of 14 Motion seeking a ruling that records returned from a govt entity pursuant to subpoena be deemed authentic is denied with leave to renew at trial. Signed by Senior Judge Thomas J. McAvoy on 4/4/11. (sfp,) (Entered: 04/04/2011)
04/04/2011	39	MOTION to Compel *Brady and Jencks Material* by Giridhar C. Sekhar. Motion Hearing set for 4/12/2011 09:30 AM in Albany before Senior Judge Thomas J. McAvoy Response to Motion due by 3/28/2011 Reply to Response to Motion due by 4/1/2011. (Sekhar, Giridhar) (Entered: 04/04/2011)

Date Filed	#	Docket Text
04/04/2011	40	RESPONSE in Opposition by Giridhar C. Sekhar re 28 MOTION to Quash *Subpoenas Duces Tecum* (Sekhar, Giridhar) (Entered: 04/04/2011)
04/04/2011	41	MOTION in Limine by Giridhar C. Sekhar. (Attachments: #1 Appendix CAFR 2010) (Sekhar, Giridhar) (Entered: 04/04/2011)
04/06/2011		CRD Ligas set ddls re: setting Govt Opposition Response to deft's 39 in-limine motion to compel Brady & Jencks Material and 41 in-limine motion due by 10:00 AM on 4/08/2011 (cml) (Entered: 04/06/2011)
04/07/2011	42	MOTION for Reconsideration re 29 Order on Motion for Omnibus Relief, by Giridhar C. Sekhar. (Attachments: #1 Memorandum of Law in Support of Motion to Reconsider) (Sekhar, Giridhar) (Entered: 04/07/2011)

Date Filed	#	Docket Text
04/07/2011	43	MOTION for Protective Order by USA as to Giridhar C. Sekhar. (Coombe, Elizabeth) (Entered: 04/07/2011)
04/08/2011		Court Set Deadlines re: Govt's Opposition Response to deft's 42 Motion for Reconsideration is due by 10 AM on 4/11/11. (sfp,) (Entered: 04/08/2011)
04/08/2011	44	MOTION to Continue by Giridhar C. Sekhar. (Attachments: #1 Affidavit in Support of Motion to Continue, #2 Proposed Order/Judgment) (Sekhar, Giridhar) (Entered: 04/08/2011)
04/08/2011	45	RESPONSE in Opposition by USA as to Giridhar C. Sekhar re 39 MOTION to Compel *Brady and Jencks Material* (Coombe, Elizabeth) (Entered: 04/08/2011)
04/08/2011	46	RESPONSE in Opposition by USA as to Giridhar C. Sekhar re 41 MOTION in Limine (Coombe, Elizabeth) (Entered: 04/08/2011)

Date Filed	#	Docket Text
04/08/2011	47	REPLY TO RESPONSE to Motion by USA as to Giridhar C. Sekhar re 28 MOTION to Quash *Subpoenas Duces Tecum* (Coombe, Elizabeth) (Entered: 04/08/2011)
04/10/2011	48	Proposed Jury Instructions by Giridhar C. Sekhar (Sekhar, Giridhar) (Entered: 04/10/2011)
04/11/2011	49	RESPONSE in Opposition by USA as to Giridhar C. Sekhar re 42 MOTION for Reconsideration re 29 Order on Motion for Omnibus Relief, (Coombe, Elizabeth) (Entered: 04/11/2011)
04/11/2011	50	Letter as to Giridhar C. Sekhar requesting Opposing Defendant's Proposed Jury Instructions (Coombe, Elizabeth) (Entered: 04/11/2011)
04/11/2011	51	EXHIBIT LIST by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/11/2011)

Date Filed	#	Docket Text
04/11/2011	52	PRETRIAL MEMORANDUM *Regarding Admissibility of Co-Conspirator Statements* by Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/11/2011)
04/11/2011		Minute Entry: IN-CHAMBERS PRETRIAL CONFERENCE as to Giridhar C. Sekhar held 4/11/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: AUSA Elisabeth Coombe for Govt; Giridhar Sekar, Pro Se Deft w/ Standby Counsel AFPD Gene Primomo present; CR: B. Buckley; LC/JC; CRD/mp. Discussion w/ parties re: jury selection process, evidentiary issues, etc. AAG Nelson Sheingold from NYS Comptroller's Office present. Judge hears argument re: Govt's 28 MOTION to Quash Defense Subpoenas Duces Tecum GRANTED IN PART / DENIED IN PART. AAG Sheingold no longer present. Court adjourned until 9:30 AM on 4/12/11 at which time deft's suppression hearing

Date Filed	#	Docket Text
		will go forward. (cml) [3:30p - 6:15p] (Entered: 04/12/2011)
04/12/2011	53	TRIAL BRIEF by Giridhar C. Sekhar (Sekhar, Giridhar) (Entered: 04/12/2011)
04/12/2011	54	Proposed Voir Dire by Giridhar C. Sekhar (Sekhar, Giridhar) (Entered: 04/12/2011)
04/12/2011	55	PROPOSED VERDICT FORM by Giridhar C. Sekhar (Sekhar, Giridhar) (Entered: 04/12/2011)
04/12/2011	56	Letter as to Giridhar C. Sekhar requesting Notice that Government Will Introduce Only a Portion of Defendant's Statement (Coombe, Elizabeth) (Entered: 04/12/2011)
04/12/2011	62	Minute Entry: SUPPRESSION EVIDENTIARY HEARING as to Giridhar C. Sekhar held 4/12/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: AUSA Elizabeth Coombe for Govt; Pro Se Deft Giridhar Sekhar w/ AFPD Gene Primomo as standby

Date Filed	#	Docket Text
		counsel present; CR: T. Casal; LC/JC; CRD/ban. GOVT WITNESS: Robert Muller. Govt rests. DEFENSE WITNESS: Giridhar Sekhar. Defense rests. Evidence now closed. Court renders bench decision DENYING deft's 13 motion / suppress. Court stands in recess until jury selection. (cml) [9:35a - 12:03p] (Entered: 04/18/2011)
04/12/2011	63	Minute Entry: JURY SELECTION as to Giridhar C. Sekhar held on 4/12/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: AUSA Elizabeth Coombe for Govt; Pro Se Deft Giridhar Sekhar w/ AFPD Gene Primomo as standby counsel present; CR: T. Casal; LC/JC; CRD/ban. Jury selection conducted. Jury sworn w/ 12 jurors & 4 alternate jurors empaneled. Judge gives jury preliminary charge. Court adjourned until 9:45 AM on 4/13/2011. (cml) (Entered: 04/18/2011)

Date Filed	#	Docket Text
04/13/2011	57	NON-PARTY NOTICE of NYS Comptroller Counsel Atty Nancy Groenwegen as to deft Giridhar C. Sekhar dtd 4/13/11 advising of trial witness unavailability relating to various potential NYS Comptroller witnesses subpoenaed by deft Sekhar (cml) Modified on 4/13/2011 to correct title of Atty Groenwegen (cml) (Entered: 04/13/2011)
04/13/2011	64	Minute Entry: JURY TRIAL / PROOF COMMENCES as to Giridhar C. Sekhar on 4/13/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: AUSA Elizabeth Coombe for Govt; Pro Se Deft Giridhar Sekhar w/ AFPD Gene Primomo as standby counsel present; CR: T. Casal; LC/JC; CRD/ban. Each side present opening stmts. GOVT WITNESS: Luke Bierman. Govt proffers Govt Exhibit 19-A; Thomas McGrath called to take stand & questioned re: G-19A exhibit; Court makes ruling. Court adjourned until 9:45

Date Filed	#	Docket Text
		AM on 4/14/2011. (cml) (Entered: 04/18/2011)
04/14/2011	58	TRIAL BRIEF by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/14/2011)
04/14/2011	65	Minute Entry: JURY TRIAL as to Giridhar C. Sekhar held 4/14/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: AUSA Elizabeth Coombe for Govt; Pro Se Deft Giridhar Sekhar w/ AFPD Gene Primomo as standby counsel present; CR: T. Casal; LC/JC; CRD/ban. GOVT WITNESS: Luke Bierman (con't), Daniel Irwin Alfin, Matthew McDonnell, Robert G. Muller, William Kuba, Corey Pritchard & Julie K. Mounce. Govt rests. Jury steps aside. Defense argues Rule 29 motion & also renews motions for facial insufficiency & due process violations RESERVED. DEFENSE WITNESS: Matthew McDonnell. Court adjourned until 10:00 AM on 4/15/2011. (cml) (Entered: 04/18/2011)

Date Filed	#	Docket Text
04/15/2011	59	TRIAL BRIEF by Giridhar C. Sekhar (Sekhar, Giridhar) (Entered: 04/15/2011)
04/15/2011	66	Minute Entry: JURY TRIAL as to Giridhar C. Sekhar held 4/15/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: AUSA Elizabeth Coombe for Govt; Pro Se Deft Giridhar Sekhar w/ AFPD Gene Primomo as standby counsel present; CR: T. Casal; LC/JC; CRD/ban. Court releases Alt Juror #2 after consultation w/ parties. DEFENSE WITNESS: Harry William Ruda, Brad Woolworth, William James Temple, Jr., Mary Louise Mallick, Thomas McGrath & Robert L. Godgart. Defense rests. No rebuttal. Evidence now closed. Defense renews Rule 29 motion. Juror issue discussed w/ parties; Juror #10 now excused. Jury enters & discharged until 9:30 AM on 4/18/2011. Parties recess to chambers; charge conference held. (cml) (Entered: 04/18/2011)

Date Filed	#	Docket Text
04/17/2011	60	Proposed Jury Instructions by Giridhar C. Sekhar (Sekhar, Giridhar) (Entered: 04/17/2011)
04/17/2011	61	TRIAL BRIEF by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 04/17/2011)
04/18/2011	67	Minute Entry: JURY TRIAL CONCLUDED as to Giridhar C. Sekhar on 4/18/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: AUSA Elizabeth Coombe for Govt; Pro Se Deft Giridhar Sekhar w/ AFPD Gene Primomo as standby counsel present; CR: T. Casal; LC/JC; CRD/mp. Discussion w/ parties re: parameters of closing remarks & time limits set. Govt summation. Defense summation. Govt rebuttal summation. Judge charges jury. Charge concluded. Alternate jurors excused w/ thanks of the court. USM sworn. Jury step aside & commence deliberations. Jury returns verdict of GUILTY on cts 1 thru 6 of Indictment

Date Filed	#	Docket Text
		ACQUITTED on ct 7 only. Jury discharged w/ court thanks & step aside. Parties advised post-verdict rights. Govt moves for deft's immediate remand; defense argues opposition DENIED; deft remains released on previously set conditions. SENTENCING s/f 8/16/2011 at 9:30 AM in Albany, NY. (cml) (Entered: 04/18/2011)
04/18/2011	68	GUIDELINE ORDER as to Giridhar C. Sekhar setting SENTENCING for 8/16/2011 at 9:30 AM in ALBANY, NY bef Sr. Judge Thomas J. McAvoy. Govt & Defense Sentencing Memos due 7/26/2011; Signed by Sr. District Judge Thomas J. McAvoy dtd 4/18/2011 (cml) (Entered: 04/18/2011)
04/18/2011	69	JURY VERDICT as to Giridhar C. Sekhar of GUILTY on counts 1-6 and ACQUITTED on count 7 (cml) (Entered: 04/20/2011)

Date Filed	#	Docket Text
04/20/2011	70	GOVT Executed TRIAL EXHIBIT LIST as to Giridhar C. Sekhar (cml) (Entered: 04/20/2011)
04/20/2011	71	JOINT Executed TRIAL EXHIBIT LIST of USA & Deft Giridhar C. Sekhar (cml) (Entered: 04/20/2011)
		* * *
04/26/2011	73	Letter from Kimberly Zimmer as to Giridhar C. Sekhar requesting extension of time to file post trial motions (Zimmer, Kimberly) (Entered: 04/26/2011)
04/26/2011	74	Amended Letter from Kimberly Zimmer as to Giridhar C. Sekhar requesting extension of time to file post trial motions (Zimmer, Kimberly) Modified on 4/26/2011 to reflect this amends 73 letter request(sfp,). (Entered: 04/26/2011)

Date Filed	#	Docket Text
04/26/2011		TEXT ORDER granting Deft's 74 Letter Request for extension of time to 5/16/11 to file post trial motions. Authorized by the Honorable Thomas J. McAvoy on 4/26/11. (sfp,) (Entered: 04/26/2011)
		* * *
05/16/2011	81	MOTION for New Trial, MOTION for Acquittal (Motion Hearing set for 7/11/2011 09:00 AM in Albany before Senior Judge Thomas J. McAvoy, Response to Motion due by 6/24/2011, Reply to Response to Motion due by 6/30/2011.) by Giridhar C. Sekhar. (Hill, Benjamin) (Entered: 05/16/2011)
05/16/2011	82	AFFIDAVIT in Support by Giridhar C. Sekhar re 81 MOTION for New Trial MOTION for Acquittal (Hill, Benjamin) (Entered: 05/16/2011)
		* * *

Date Filed	#	Docket Text
05/17/2011		COURT TEXT NOTICE scheduling Deft Sekhar's 81 MOTION for New Trial and Acquittal for Senior Judge McAvoy's 6/24/2011 motion calendar at 10:00am in Binghamton. Govt Response to Motion due by 6/7/2011. (amt) (Entered: 05/17/2011)
		* * *
06/06/2011	85	Letter from the United States as to Giridhar C. Sekhar requesting An Additional Three Weeks to Respond to Defendant's Post-Trial Motions (Coombe, Elizabeth) (Entered: 06/06/2011)
06/07/2011		TEXT ORDER granting Govt's 85 Letter Request. Deft's 81 Motion for New Trial / Acquittal is adjourned to Judge McAvoy's 7/11/11 Motion Calendar at 10 AM in Albany. Govt's Response to Motion is due by 6/28/2011. Authorized by the Honorable Thomas J. McAvoy on 6/7/11. (sfp,) (Entered: 06/07/2011)

Date Filed	#	Docket Text
06/24/2011	86	Minute Entry: MOTION CALENDAR as to Giridhar C. Sekhar held 6/24/2011 bef Sr. District Judge Thomas J. McAvoy in Binghamton, NY: APP/LC: None; CR: T. Casal; CRD/cml. Deft Sekhar's 81 MOTION for New Trial and/or for Acquittal - ADJOURNED until 7/11/11 in Albany. (cml) (Entered: 06/24/2011)
06/27/2011	87	CJA 7 ORDER as to Giridhar C. Sekhar terminating Appointment of AFPD Gene V. Primomo, Esq. as deft's counsel of record; Signed by Sr. District Judge Thomas J. McAvoy dtd 6/27/2011 (cml) (Entered: 06/27/2011)
06/27/2011	88	COURT MOTION as to deft Giridhar C. Sekhar for an Order directing Deft Sekhar to reimburse the Court for deft's FPD representation returnable on 8/08/11 at 10:00 AM in ALBANY, NY bef Sr. District Judge Thomas J. McAvoy ON SUBMIT BASIS (Attachments: #1 FPD Staff Hours Report of AFPD Gene

Date Filed	#	Docket Text
		Primomo, Esq.) (cml) (Entered: 06/27/2011)
06/27/2011		TEXT ONLY NOTICE OF HEARING on COURT'S 88 MOTION to reimburse the Court for deft's FPD Office representation as to Giridhar C. Sekhar: setting Deft's Response to Motion due by 7/22/2011; and, setting MOTION HEARING for 8/08/2011 at 10:00 AM in ALBANY, NY bef Sr. District Judge Thomas J. McAvoy ON SUBMIT BASIS; no personal appearances required. (cml) (Entered: 06/27/2011)
06/28/2011	89	RESPONSE in Opposition by USA as to Giridhar C. Sekhar re 81 MOTION for New Trial MOTION for Acquittal (Coombe, Elizabeth) (Entered: 06/28/2011)
06/28/2011	90	RESPONSE in Opposition by USA as to Giridhar C. Sekhar re 81 MOTION for New Trial MOTION for Acquittal *Corrected Copy* (Coombe, Elizabeth) (Entered: 06/28/2011)

Date Filed	#	Docket Text
07/06/2011		COURT'S TEXT NOTICE to parties advising that the pending motion for 7/11/11 is on submit basis, no appearances necessary. (sfp,) (Entered: 07/06/2011)
07/08/2011	91	REPLY TO RESPONSE to Motion by Giridhar C. Sekhar re 81 MOTION for New Trial MOTION for Acquittal *Reply Brief in Support of Rule 29 Motion* (Hill, Benjamin) (Entered: 07/08/2011)
		* * *
07/11/2011	93	Minute Entry: MOTION CALENDAR as to Giridhar C. Sekhar held 7/11/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: None; CR: B. Buckley; LC/JC; CRD/mp. Deft Sekhar's 81 MOTION for New Trial and/or for Acquittal - TAKEN ON SUBMIT. (cml) (Entered: 07/13/2011)

Date Filed	#	Docket Text
07/19/2011	94	Letter from Elizabeth C. Coombe as to Giridhar C. Sekhar requesting Adjournment of Sentencing Date (Coombe, Elizabeth) (Entered: 07/19/2011)
		* * *
07/20/2011	95	PRESENTENCE INVESTIGATION REPORT - INITIAL DISCLOSURE [LODGED] as to Giridhar C. Sekhar. The Presentence Investigation Report in this matter is now available for review. Any objections to the report shall be served on the Probation Office within 14 days of this notice, by mailing a hard copy to the Probation Officer. Please contact the probation officer who prepared the report if you have any questions. [This document has been electronically lodged with the Court and is viewable by ONLY the attorney for the government, the attorney for the defendant, and the presiding judge. It is not a filed document, therefore is

Date Filed	#	Docket Text
		not available for public inspection. Any further distribution or dissemination is prohibited.] (bam2,) (Entered: 07/2[illegible]2011)
		* * *
07/22/2011	96	MOTION Reconsider Order to Reimburse FPD by Giridhar C. Sekhar. (Sekhar, Giridhar) (Entered: 07/22/2011)
07/26/2011	97	DECISION AND ORDER denying Deft's 81 Motion for New Trial / and or for Acquittal. Signed by Senior Judge Thomas J. McAvoy on 7/26/11. [Served deft by mail.] (sfp,) (Entered: 07/26/2011)
08/04/2011	98	DECISION AND ORDER granting the Court's 88 Motion ordering Deft to pay the Clerk of the Court by check or money order, $9,375.00 as reimbursement for the counsel fees rendered in this matter; and, also, denying Deft's 96 Motion for reconsideration. Deft's electronic case filing privileges are terminated. Signed by Senior Judge

Date Filed	#	Docket Text
		Thomas J. McAvoy on 8/4/11. (sfp,) (Entered: 08/04/2011)
08/08/2011	99	Minute Entry: MOTION CALENDAR as to Giridhar C. Sekhar held 8/08/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: None; CR: L. Tennyson; LC/JC; CRD/mp. Court's 88 MOTION to reimburse the Court for deft's FPD Office representation - TAKEN ON SUBMIT [addressed by TJM 98 order]. (cml) (Entered: 08/20/2011)
		* * *
09/20/2011	100	PRESENTENCE INVESTIGATION REPORT FINAL DISCLOSURE [LODGED] as to Giridhar C. Sekhar. The final version of the Presentence Investigation Report, including all revisions and the most recent Addendum is now available for review. This version of the report will be used by the Court at the time of sentencing. [This document has been electronically lodged with the Court and is

Date Filed	#	Docket Text
		viewable by ONLY the attorney for the government, the attorney for the defendant, and the presiding judge. Any further distribution or dissemination is prohibited.] (bam2,) (Entered: 09/20/2011)
09/27/2011	101	SENTENCING MEMORANDUM by Giridhar C. Sekhar (Zimmer, Kimberly) (Entered: 09/27/2011)
09/27/2011	102	SENTENCING MEMORANDUM by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 09/27/2011)
09/28/2011	103	Amended SENTENCING MEMORANDUM by USA as to Giridhar C. Sekhar (Coombe, Elizabeth) (Entered: 09/28/2011)

* * *

Date Filed	#	Docket Text
10/04/2011	104	Minute Entry: SENTENCING of Giridhar C. Sekhar held 10/04/2011 bef Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: AUSA Elizabeth Coombe for Govt; William Dreyer & Benjamin Hill, Esqs. for Deft; SUSPO Charles Bell present; CR: T. Casal; CRD/mp. Victim impact stmt made in open court. Deft sentenced on jury convicted cts 1-6 of Indictment and committed to BOP custody for a term of imprisonment of 15 months on each ct 1-6 w/ such terms to run concurrently. Facility designation recommendation made. Supervised Release of 2 years on ct 1 & 1 year on each ct 2-6 w/ such terms to run concurrently. Mandatory drug testing SUSPENDED. Special Conditions stated. Total Special Assessment of $600.00 due immediately. No fine and/or add'l costs imposed. Parties advised appeal rights. Remaining ct 7 dismissed based upon deft's acquittal at trial. Deft moves for release pending appeal DENIED; deft remanded to USM. (cml) (Entered: 10/05/2011)

Date Filed	#	Docket Text
		* * *
10/06/2011	106	JUDGMENT as to Giridhar C. Sekhar (1), Count(s) 1-6, Deft committed to BOP custody for a term of imprisonment of 15 months on each ct 1-6 w/ such terms to run concurrently and w/ facility designation recommendation made. Supervised Release of 2 years on ct 1 & 1 year on cts 2-6 w/ such terms to run concurrently. Mandatory drug testing SUSPENDED. Special Conditions imposed. Total Special Assessment $600.00 ordered due. No fine and/or add'l costs imposed.; Count(s) 2-6, As referenced in count 1; Count(s) 7, Acquitted at trial. Signed by Senior Judge Thomas J. McAvoy on 10/6/11. (sfp,) (Entered: 10/06/2011)
10/06/2011	107	STATEMENT OF REASONS [LODGED] as to Giridhar C. Sekhar [This document has been electronically lodged with the Court and is viewable by ONLY the Govt & deft's attorney and the

Date Filed	#	Docket Text
		presiding judge. It is not a filed document, therefore is not available for public inspection. Any further distribution or dissemination is prohibited.] (cml) (Entered: 10/06/2011)
		* * *
10/12/2011	110	NOTICE OF APPEAL by Giridhar C. Sekhar re 106 Judgment,, Filing Fee $455, receipt number 0206-1992773. (Dreyer, William) (Entered: 10/12/2011)
		* * *
10/12/2011	112	ELECTRONIC NOTICE AND CERTIFICATION as to Giridhar C. Sekhar sent to US Court of Appeals re 110 Notice of Appeal Final Judgment (sfp,) (Entered: 10/12/2011)
10/20/2011	113	Application for Search Warrant as to Giridhar C. Sekhar. (rjb,) (Entered: 10/20/2011)
10/20/2011	114	Search Warrant Returned Executed as of 3/4/11 - 3/10/11 (rjb,) (Entered: 10/20/2011)

Date Filed	#	Docket Text
10/20/2011	115	Application for Search Warrant as to Giridhar C. Sekhar. (rjb,) (Entered: 10/20/2011)
10/20/2011	116	Search Warrant Returned Executed as of 3/4/11-3/10/11 (rjb,) (Entered: 10/20/2011)
10/28/2011		USCA Case Number is 11-4298 for 110 Appeal filed by Giridhar C. Sekhar. (cbm) (Entered: 10/28/2011)
07/31/2012	117	MANDATE of USCA, issued 7/19/12, as to Giridhar C. Sekhar's 110 Appeal, affirming judgment of the district court in accordance w/attached slip opinion. (cbm) (Entered: 07/31/2012)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 11-4298

UNITED STATES OF AMERICA

v.

GIRIDHAR SEKHAR

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
10/18/2011	1	NOTICE OF CRIMINAL APPEAL, with district court docket, on behalf of Appellant Giridhar C. Sekhar, FILED. [423131] [11-4298]
		* * *
10/18/2011	3	DISTRICT COURT JUDGMENT, dated 10/06/2011, RECEIVED. [423139] [11-4298]
10/18/2011	4	ELECTRONIC INDEX, in lieu of record, FILED. [423141] [11-4298]

Date Filed	#	Docket Text
10/20/2011	5	CRIMINAL DOCKETING NOTICE, to Appellant Giridhar C. Sekhar, ISSUED. [423144] [11-4298]
		* * *
11/23/2011	13	SCHEDULING NOTIFICATION, on behalf of Appellant Giridhar C. Sekhar, informing Court of proposed due date 01/20/2012, RECEIVED. Service date 11/23/2011 by CM/ECF. [455841] [11-4298]
11/23/2011	14	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellant Giridhar C. Sekhar Brief due date as 01/20/2012; Joint Appendix due date as 01/20/2012, FILED. [455974] [11-4298]
11/23/2011	15	NOTICE, for the submission of additional paper copies of the appendix or joint appendix, SENT. [455981] [11-4298]

Date Filed	#	Docket Text
12/22/2011	16	BRIEF & APPENDIX, on behalf of Appellant Giridhar C. Sekhar, FILED. Service date 12/22/2011 by CM/ECF. [480474] [11-4298]
12/22/2011	17	MOTION, to expedite appeal, on behalf of Appellant Giridhar C. Sekhar, FILED. Service date 12/22/2011 by CM/ECF. [480507] [11-4298]
12/28/2011	20	OPPOSITION TO MOTION to expedite appeal [17], on behalf of Appellee USA United States of America, FILED. Service date 12/28/2011 by CM/ECF. [483316][20] [11-4298]
12/28/2011	21	REPLY TO OPPOSITION [20], on behalf of Appellant Giridhar C. Sekhar, FILED. Service date 12/28/2011 by CM/ECF. [483654][21] [11-4298]

Date Filed	#	Docket Text
01/03/2012	28	MOTION ORDER, dated 01/03/2012, that the motion by appellant Giridhar C. Sekhar's to compel the Government to file its brief on or before 01/23/2012 is DENIED. The Government brief must be filed on or before February 27, 2012. The appeal is expedited and will be presented to a panel as early as the week of 04/09/2012, subject to the approval of the presiding judge, [17], by SLC, FILED. [486462][28] [11-4298]--[Edited 02/17/2012 by MR]
01/05/2012	30	DEFECTIVE BRIEF/ APPENDICES VOLUMES 1-2, [16], on behalf of Appellant Giridhar C. Sekhar, FILED. [488898] [11-4298]
01/05/2012	31	BRIEF, on behalf of Appellant Giridhar C. Sekhar, FILED. Service date 01/05/2012 by CM/ECF. [489760] [11-4298]

Date Filed	#	Docket Text
01/05/2012	32	JOINT APPENDIX, volume 1 of 2, on behalf of Appellant Giridhar C. Sekhar, FILED. Service date 01/05/2012 by CM/ECF. [489771] [11-4298]
01/05/2012	33	JOINT APPENDIX, volume 2 of 2, on behalf of Appellant Giridhar C. Sekhar, FILED. Service date 01/05/2012 by CM/ECF. [489781] [11-4298]
01/09/2012	34	CURED DEFECTIVE BRIEF & APPENDICES [31], [32], [33], on behalf of Appellant Giridhar C. Sekhar, FILED. [491947] [11-4298]
		* * *
02/27/2012	44	MOTION, to file supplemental appendix, on behalf of Appellee USA United States of America, FILED. Service date 02/27/2012 by CM/ECF. [536703] [11-4298]

Date Filed	#	Docket Text
02/27/2012	45	BRIEF, on behalf of Appellee USA United States of America, FILED. Service date 02/27/2012 by CM/ECF. [536705] [11-4298]
02/27/2012	46	SUPPLEMENTAL APPENDIX, on behalf of Appellee USA United States of America, FILED. Service date 02/27/2012 by CM/ECF. [536707] [11-4298]
03/01/2012	52	MOTION ORDER, granting motion to file supplemental appendix [44] filed by Appellee USA United States of America, FILED. [540677][52] [11-4298]
		* * *
03/09/2012	58	REPLY BRIEF, on behalf of Appellant Giridhar C. Sekhar, FILED. Service date 03/09/2012 by CM/ECF. [548195] [11-4298]
		* * *
04/16/2012	66	CASE, before DJ*, BDP, PWH, C.JJ., HEARD. [580519] [11-4298]

Date Filed	#	Docket Text
04/17/2012	67	LETTER, on behalf of Appellee USA United States of America, RECEIVED. Service date 04/17/2012 by CM/ECF. [582841] [11-4298]
		* * *
06/26/2012	73	OPINION, affirmed, by DJ, BDP, PWH, FILED. [647169] [11-4298]
06/26/2012	76	JUDGMENT, FILED. [648560] [11-4298]
07/12/2012	77	ERRATA SHEET, for Opinion dated 06/26/2012, by DJ. FILED. [661178] [11-4298]
07/19/2012	78	JUDGMENT MANDATE, ISSUED. [668703] [11-4298]
09/24/2012	79	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 09/24/2012, U.S. Supreme Court docket #12-357, RECEIVED. [732206] [11-4298]

Date Filed	#	Docket Text
01/11/2013	80	U.S. SUPREME COURT NOTICE, dated 01/11/2013, U.S. Supreme Court docket #12-357, stating the petition for writ of certiorari is granted, RECEIVED. [816204] [11-4298]

Government Exhibit 1, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Thomas P. DiNapoli
State Comptroller

Luke Bierman
General Counsel

Helen M. Fanshawe
Deputy Counsel

State of New York
Office of the State Comptroller
110 State Street
Albany, New York 12236

MEMORANDUM

October 26, 2009

TO: Members of the Placement Agent Fee Disclosure Review Committee:
Raudline Etienne
George King [Handwritten: checkmark]
Suzanne Dugan

FROM: Luke Bierman [Handwritten: LB]

SUBJECT: PAFD 2009-025 FA Technology Ventures III, L.P.

I understand that the CRF is considering an investment in the above-referenced partnership, and that the Placement Agent Fee Disclosure Committee currently has the transaction before it for review.

Please be advised that I am in possession of information which is confidential in nature and related to the ongoing Martin Act investigations.

Based on information provided by the Office of the Attorney General (OAG), it would be prudent, from a legal perspective, to avoid moving forward with this investment opportunity. The information provided by the OAG could lead to the CRF and OSC being in a vulnerable situation if the investment were made and a report or other finding of wrongdoing was subsequently issued by the OAG.

Government Exhibit 2A, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Subject: Confidential: for L. Bierman
From: M S <nyethics@yahoo.com>
Date: Tue, 17 Nov 2009 11:43:06-0800 (PST)
To: lbierman@osc.state.ny.us

Hello Mr. Bierman,

I work with you in the Comptroller's office and I have stumbled upon a serious ethical issue in the Comptroller's Office. I want to bring it to you as chief counsel, but i am very scared about repercussions. I want to send you the information that I have by email, but I don't feel comfortable sending it to you on the internal email system, because it might be read by other people, or your assistant or your staff. It involves senior people in the staff including MLM and others. It could seriously damage TD if it ever got out. I just want to give you the info and let you take care of it the way you think is best, and maybe you think it should go directly to Cuomo. I don't ever want to be identified as the one who told you.

Can you send me your *non-office email address* and I will follow up with more information. Please do not pull others into this as I am worried about myself.

Thank you,

NYEthics

Government Exhibit 3A, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Gmail by Google
Luke Bierman <lbierman57@gmail.com>

Re: Confidential: for L. Bierman

Tue, Nov 17, 2009 at 6:02 PM
LBierman@osc.state.ny.us
<LBierman@osc.state.ny.us>
To: M S <nyethics@yahoo.com>
Bcc: lbierman57@gmail.com

Thank you for your email. I am concerned about any allegations of the type you describe. You should be aware that there are processes in place in the agency to protect the identity of folks like you who want to disclose confidentially apparent wrongdoing at all levels of the agency—the Inspector General's office is designed precisely for this—the confidential email for the Inspector General is InspectorGeneral@osc.state.ny.us—it is preferable for you to report wrongdoing here. But I will provide a private email for me should you wish to use that—Lbierman57@gmail.com. Thank you.

Luke Bierman
General Counsel
NYS Office of the State Comptroller
(518) 474-3444 (office)
(518) 473-9104 (fax)

M S <nyethics@yahoo.com>
To lbierman@osc.state.ny.us
cc
11/17/2009 02:43 PM

Subject Confidential: for L. Bierman

Hello Mr. Bierman,

I work with you in the Comptroller's office and I have stumbled upon a serious ethical issue in the the Comptroller's Office. I want to bring it to you as chief counsel, but i am very scared about about repercussions. I want to send you the information that I have by email, but I don't feel comfortable sending it to you on the internal email system, because it might be read by other people, people, or your assistant or your staff. It involves senior people in the staff including MLM and others. It could seriously damage TD if it ever got out. I just want to give you the info and let you let you take care of it the way you think is best, and maybe you think it should go directly to Cuomo. Cuomo. I don't ever want to be identified as the one who told you.

Can you send me your *non-office email address* and I will follow up with more information. Please Please do not pull others into this as I am worried about myself.

Thank you,

* * *

Government Exhibit 4A, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Gmail by Google
Luke Bierman <lbierman57@gmail.com>

Internal Affairs

Wed, Nov 18, 2009 at 10:42 AM
M S <nyethics@yahoo.com>
To: Lbierman57@gmail.com

Dear Mr. Bierman,

I am glad we are handling this ethics situation through your personal email, because this ethics issue involves YOU. and I am bringing it to your attention becuz I sincerely don't want you to get hurt and it would be bad if anyone in your office read this even your secretary.

Last week u did something that was wrong. U blackballed a recommendation on a fund from the investment staff becuz they had a relationship with a friend of mine. U implied that this friend was dirty and that TD should stay away for political reasons. That is just wrong and unethical and it undermines the function of this office. My friend has been a public servant in NY for a long time and she has done many great things to help the public and the poor. She has helped me out and I know her to be a great and ethical person. Just because you don't like her U can't just blackball any group that has ever known her or done business with her.

People in the office are depressed because they feel that one form of corruption (pay to play) is now being

replaced by a different form of corruption (the politics of personal destruction). I can't take the atmosphere of politics, distrust, and depression any more.

U accuse her of being dirty, but U saw nothing unethical in having an affair with the [REDACTED]? I know about your tryst with [REDACTED] and I have more than enough to prove it including messages and witnesses. how could U do such a thing? we have enough trouble that we need you fooling around with [REDACTED]. i find it so dirty and disgusting. do you realize how this affair has stalled activity in our office and created a hostile work environment? how are people supposed to work when we don't know who is whispering what to who in the bedroom?

I am not here to make any money off you or to cause you any trouble. I just want the madness in this office to end and i need you to make a fix. Here is what i want you to do:

1) Go to TD, MLM, RE, GK, [REDACTED] et al. and tell them you've had a few days to think things over and have had a change of heart. You now recommend moving forward with this fund and accepting the decision of the investment staff

2) You will make a reason such as you reviewed the files and realize that this fund is very important to the In State investing program because they are so active in upstate new york and have created so many jobs. You now believe that to not do this fund would cause terrible disaster to the In State investing program, and that there is a great political liability to TD to do so.

3) You will reverse your terrible statements on my friend and say positive things

You need to do this by THIS FRIDAY November 20. If you do not do so by Friday, each day I will release the [REDACTED] information to a different person in your life the following week:
by Monday, to Laura
by Tuesday, to [REDACTED]
by Wednesday, to TD
by Thursday, to the Inspector General
by Friday, to Cuomo
by Monday week after, to the Albany Times Union

it will make a juicy story about an ethics scandal in the [REDACTED]

I am sure in your paranoia U will try to figure out who I am. But I am not who you think I am. I am the quiet one who doesn't have a big job or make a lot of money. I like people, and I don't like to see good people hurt. I am not going to be a pest in your life, or a dark cloud hanging over your head. I just want to see evidence that you're a person whocan do the right thing. don't look for me. don't try to figure out who sent this to you. If Udo, the files will be sent to Cuomo et al. you should just go about your normal work day and you will never hear about this again. i promise you that i'm not out to get you or keep sending you dark emails. i just want our office to function normally

---

NYEthics

Notice: This communication, including any attachments, is intended solely for the use of the

individual or entity to which it is addressed. This communication may contain information that is protected from disclosure under State and/or Federal law. Please notify the sender immediately if you have received this communication in error and delete this email from your system. If you are not the intended recipient, you are requested not to disclose, copy, distribute or take any action in reliance on the contents of this information.

* * *

Government Exhibit 5A, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Gmail by Google
Luke Bierman <lbierman57@gmail.com>

---

36 hours left

Wed, Nov 18, 2009 at 8:42 PM
M S <nyethics@yahoo.com>
To: Lbierman57@gmail.com,
LBierman@osc.state.ny.us

To make the wrong right

---

* * *

Government Exhibit 6A, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Gmail by Google
Luke Bierman <lbierman57@gmail.com>

---

24 hours left

Thu, Nov 19, 2009 at 7:13 AM
M S <nyethics@yahoo.com>
To: Lbierman57@gmail.com,
LBierman@osc.state.ny.us

From: M S <nyethics@yahoo.com>
To: Lbierman57@gmail.com,
LBierman@osc.state.ny.us
Sent: Wed, November 18, 2009 at 8:42:56 PM
Subject: 36 hours left

To make the wrong right

---

* * *

Government Exhibit 7A, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Gmail by Google
Luke Bierman <lbierman57@gmail.com>

Draft Letter to AG

Thu, Nov 19, 2009 at 1:29 PM
M S <nyethics@yahoo.com>
To: Luke Bierman LBierman@osc.state.ny.us,
Luke Bierman <Lbierman57@gmail.com>

Dear Luke,

I would like to get your guidance to write my letter to the AG. U are an expert in the law and you are a better writer. I have started my draft. Can you comment on it so it can be in good shape when I send it out next week?

if you don't like this draft (see below), then you should go forward with the other solution that I suggested in the other email from yesterday. that might put a quick end to the problem

---

Dear Mr. Cuomo:

I am writing to expose a very troubling situation here at the New York State Comptroller's Office. Your office has done so much to clear up graft and corruption at the pension fund. Tom DiNapoli has taken your lead and instituted policies and procedures to make sure that pay to play never takes hold again. One of the key things he has done is institute an office for Ethics to vet questionable situations.

Here is the problem. XXXX XXXX was appointed the [REDACTED] in 2007. Her job was to help restore the public's confidence at the Comptroller's office. How is that possible when she has engaged in an illicit extramarital affair with XXXXX XXXXX who is the General Counsel? This affair has had a tremendous negative impact on the functioning of the Comptroller's Office. I have made a partial list of the problems this immoral behavior is causing.

1) Creation of a hostile work environment and a sexualization of every day office business

2) Loss of trust in the office of [REDACTED]

3) Loss of trust in the General Counsel

4) Backlog of investment commitments that the office cannot process as the relationship between the 2 attorneys holds up business on a regular basis

5) Loss of trust in general office communications. the belief that the "walls have ears" and that secrets are shared in the bedroom

6) Loss of the services paid for by New York taxpayers of these two employees as they diverted paid time to their personal relationship

7) Increased politicization and creation of enemies list holding up approval of wise investments vetted by the investment staff

---

this is just a first draft. Luke, can you add or edit the content as you see appropriate? I really need this turned quickly since we only have 12 more hours left.

* * *

Government Exhibit 8A, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Gmail by Google
Luke Bierman <lbierman57@gmail.com>

Re: Draft Letter to AG

Fri, Nov 20, 2009 at 3:05 PM
Luke Bierman <lbierman57@gmail.com>
To: M S <nyethics@yahoo.com>

I have been working on this matter but find it will take longer to resolve than today due to the difficulty in availability of the necessary folks. I will continue working on this through the weekend and Monday as I can get with those necessary people. I will advise as things progress.

On Thu, Nov 19, 2009 at 1:29 PM, M S <nyethics@yahoo.com> wrote:

> Dear Luke,
>
> I would like to get your guidance to write my letter to the AG. U are an expert in the law and you are a better writer. I have started my draft. Can you comment on it so it can be in good shape when I send it out next week?
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>
> ---
>
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Here is the problem. XXXX XXXX was appointed the [REDACTED] in 2007. Her job was to help restore the public's confidence at the Comptroller's office. How is that possible when she has engaged in an illicit extramarital affair with XXXXX XXXXX who is the General Counsel? This affair has had a tremendous negative impact on the functioning of the Comptroller's Office. I have made a partial list of the problems this immoral behavior is causing.

1) Creation of a hostile work environment and a sexualization of every day office business

2) Loss of trust in the office of [REDACTED]

3) Loss of trust in the General Counsel

4) Backlog of investment commitments that the office cannot process as the relationship between the 2 attorneys holds up business on a regular basis

5) Loss of trust in general office communications. the belief that the "walls have ears" and that secrets are shared in the bedroom

6) Loss of the services paid for by New York taxpayers of these two employees as they diverted paid time to their personal relationship

7) Increased politicization and creation of enemies list holding up approval of wise investments vetted by the investment staff

---

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---

* * *

Government Exhibit 9A, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Gmail by Google
Luke Bierman <lbierman57@gmail.com>

Re: Draft Letter to AG

Mon, Nov 23, 2009 at 7:19 PM
M S <nyethics@yahoo.com>
To: Luke Bierman <lbierman57@gmail.com>

Thank you, Mr. Bierman. I have heard as such through other channels and won't expect anything to change until Wednesday. I feel really badly about our exchanges. But she is someone I owe a *personal* debt to, who helped me out when I was down. If you can get this fixed by Wednesday, you will never hear about this again.

From: Luke Bierman <lbierman57@gmail.com>
To: M S <nyethics@yahoo.com>
Sent: Fri, November 20, 2009 at 3:05:21 PM
Subject: Re: Draft Letter to AG

I have been working on this matter but find it will take longer to resolve than today due to the difficulty in availability of the necessary folks. I will continue working on this through the weekend and Monday as I can get with those necessary people. I will advise as things progress.

On Thu, Nov 19, 2009 at 1:29 PM, M S <nyethics@yahoo.com> wrote:

Dear Luke,

I would like to get your guidance to write my letter to the AG. U are an expert in the law and you are a better writer. I have started my draft. Can you comment on it so it can be in good shape when I send it out next week?

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---

Dear Mr. Cuomo:

I am writing to expose a very troubling situation here at the New York State Comptroller's Office. Your office has done so much to clear up graft and corruption at the pension fund. Tom DiNapoli has taken your lead and instituted policies and procedures to make sure that pay to play never takes hold again. One of the key things he has done is institute an office for Ethics to vet questionable situations.

Here is the problem. XXXX XXXX was appointed the [REDACTED] in 2007. Her job was to help restore the public's confidence at the Comptroller's office. How is that possible when she has engaged in an illicit extramarital affair with XXXXX XXXXX who is the General Counsel? This affair has had a tremendous negative impact on the functioning of the Comptroller's Office. I have made a partial list of the problems this immoral behavior is causing.

1) Creation of a hostile work environment and a sexualization of every day office business

2) Loss of trust in the office of [REDACTED]

3) Loss of trust in the General Counsel

4) Backlog of investment commitments that the office cannot process as the relationship between the 2 attorneys holds up business on a regular basis

5) Loss of trust in general office communications. the belief that the "walls have ears" and that secrets are shared in the bedroom

6) Loss of the services paid for by New York taxpayers of these two employees as they diverted paid time to their personal relationship

7) Increased politicization and creation of enemies list holding up approval of wise investments vetted by the investment staff

---

this is just a first draft. Luke, can you add or edit the content as you see appropriate? I really need this turned quickly since we only have 12 more hours left.

---

* * *

Government Exhibit 10A, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Gmail by Google
Luke Bierman <lbierman57@gmail.com>

Progress Report

Tue, Dec 1, 2009 at 8:05 AM
M S <nyethics@yahoo.com>
To: Luke Bierman LBierman@osc.state.ny.us,
Luke Bierman <Lbierman57@gmail.com>

hope u had a great holiday. what do U think of that Tiger Woods story? who would have thought that a woman could get that upset... and over what?

---

* * *

Attachment to Defense Motion for Omnibus Relief, *United States v. Sekhar*, No. 10-573 (N.D.N.Y. filed Jan. 10, 2011) (Dkt. 13-2)

* * *

CITY COURT
COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

GIRIDHAR C. SEKHAR, a/k/a GIRI SEKHAR, d/o/b [REDACTED]

Defendant.

December 4, 2009

FELONY COMPLAINT

I, STEVEN D. STEIN, an Investigator with the Office of the Albany County District Attorney, accuse the above named defendant of the following:

FIRST COUNT:

Attempted Grand Larceny in the First Degree, in violation of Sections 110 and 155.42 of the Penal Law of the State of New York, a Class C Felony, in that the defendant, on or between the dates of November 17th, 2009 and December 1st, 2009, at or near the New York State Office of the State Comptroller, located at 110 State Street in the City and County of Albany, State of New York, did attempt to steal property by compelling or inducing the victim to

deliver property to the defendant or a third person by means of instilling in the victim a fear that if the property is not so delivered, the defendant will expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, ridicule, or contempt, and the value of the property exceeded one million dollars, to wit: at the aforesaid dates, times and places, the defendant, a Managing Partner with FA Technology Ventures, did attempt to steal a $25 million investment from the New York State Office of the State Comptroller by compelling or inducing the victim, Luke Bierman, Chief Counsel for the State Comptroller, to deliver said investment to FA Technology Ventures by means of emailing threats to Mr. Bierman in order to instill in Mr. Bierman a fear that, if the investment was not so delivered, he would expose an alleged sexual affair involving Mr. Bierman and another, tending to subject Mr. Bierman to hatred, contempt or ridicule.

The foregoing is based upon information and belief, the source of my information and the basis of my belief being my interview(s) with Mr. Bierman, an interview with a representative of FA Technology regarding the defendant's association therewith, emails containing the extortionist threats, and subpoenaed records from Comcast establishing through records of Ir addresses that extortionist emails sent to Mr. Bierman at the New York State Office of the State Comptroller and elsewhere in the County of Albany, NY originated from the defendant's residence at 1501 Beacon Street, Apt. 1705, in the City of Brookline, County Norfolk, Commonwealth of Massachusetts.

STEVEN D. STEIN
FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW.

* * *

Attachment to Defense Motion for Omnibus Relief, *United States v. Sekhar*, No. 10-573 (N.D.N.Y. filed Jan. 10, 2011) (Dkt. 13-16)

* * *

SUPREME COURT
COUNTY OF ALBANY

File No. 09-09165

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

GIRIDHAR C. SEKHAR, a/k/a GIRI SEKHAR,

Defendant.

February, 2, 2010
January Term

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

FIRST COUNT:

Attempted Coercion in the First Degree, in violation of Sections 110 and 135.65(2), a Class E Felony, in that the defendant, on or between the dates of November 17th, 2009 and December 1st, 2009, at or near the New York State Office of the New York State Comptroller, located at 110 State Street in the City and County of Albany, State of New York, did attempt to compel or induce another person to

engage in conduct which the latter has a legal right to abstain from engaging in or to abstain from engaging in conduct in which he or she had a legal right to engage, by means of instilling in the him or her a fear that if the demand is not complied with, the defendant or another will expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, ridicule, or contempt, and thereby attempted to compel or induce him or her to violate his or her duty as a public servant, *to wit*: at the aforesaid dates, times and places, the defendant, a Managing Partner with FA Technology Ventures, did attempt to compel or induce Luke Bierman, Chief Counsel for the New York State Office of the New York State Comptroller (Office of the State Comptroller), a public servant, to withdraw his opposition to a proposed investment of the Office of the State Comptroller with FA Technology Ventures by means of emailing threats to Mr. Bierman at his home and office located in the City and County of Albany, New York in order to instill in Mr. Bierman a fear that, if the demand were not complied with, he would expose an alleged sexual affair involving Mr. Bierman and another, tending to subject Mr. Bierman to hatred, contempt or ridicule. Said actions of the defendant did attempt to compel or induce Mr. Bierman to violate his duty as a public servant.

_____

Eric M. Galarneau
Assistant District Attorney
Albany County

SUPREME COURT
COUNTY OF ALBANY

File No. 09-09165

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

GIRIDHAR C. SEKHAR, a/k/a GIRI SEKHAR,

Defendant.

February, 2, 2010
January Term

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

SECOND COUNT:

Bribery in the Third Degree, in violation of Section 200.00, a Class D Felony, in that the defendant, on or between the dates of November 17th, 2009 and December 1st, 2009, at or near the New York State Office of the State Comptroller, located at 110 State Street in the City and County of Albany, State of New York, did confer or offer or agree to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, or exercise of discretion as public servant would thereby be influenced, *to wit*: at the aforesaid dates, times and places, the defendant, a Managing Partner with FA Technology Ventures,

did offer to confer upon Luke Bierman, Chief Counsel for the New York State Office of the New York State Comptroller (Office of the State Comptroller), a public servant, the benefit of withholding the exposure of an alleged sexual affair involving Mr. Bierman, upon the agreement or understanding that Mr. Bierman's vote, opinion, judgment, action, or exercise of discretion as public servant would thereby be influenced with respect to an investment of the Office of the State Comptroller with FA Technology Ventures.

_____

Eric M. Galarneau
Assistant District Attorney
Albany County

Attachment to Defense Motion for Omnibus Relief, *United States v. Sekhar*, No. 10-573 (N.D.N.Y. filed Jan. 10, 2011) (Dkt. 13-2)

* * *

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF ALBANY

Indictment # 24-2986
Index # DA 115-10

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

GIRIDHAR C. SEKHAR, a/k/a "GIRI SEKHAR,"

Defendant.

DECISION/ORDER

* * *

DAN LAMONT, J.

Defendant, by Omnibus Motion, moves this Court for an order granting the following relief:

1-5. RELEASE OF MINUTES/DISMISSAL OF THE INDICTMENT FOR ALLEGED INSUFFICIENCY OF THE EVIDENCE BEFORE THE GRAND JURY/DEFECTIVE GRAND JURY PROCEEDING/DEFECTIVE INDICTMENT

The Court has inspected the transcript of the minutes of the Grand Jury proceedings herein. Release of the Grand Jury minutes to legal counsel is *not* necessary to assist the Court in making its determination on the motion.

(1) The FIRST COUNT of the Indictment charges the defendant with Attempted Coercion in the First Degree in violation of Penal Law §§ 110.00 & 135.65(2). The charge is that between November 17, 2009 and December 1, 2009, at the office of the New York State Comptroller, located at 110 State Street, City and County of Albany, the defendant Giridhar C. Sekhar, a managing partner with FA Technology Ventures, did attempt to induce or compel Luke Bierman, Chief Counsel for the Office of the New York State Comptroller, a public servant, to withdraw his opposition to a proposed investment by the New York State Retirement System with FA Technology Ventures by emailing threats to Mr. Bierman at his home and office located in the City and County of Albany, New York, to expose a secret or publicize an asserted fact regarding an alleged sexual affair involving Mr. Bierman and a co-worker, thereby subjecting Mr. Bierman to hatred, contempt, or ridicule, and did thereby attempt to compel or induce Mr. Bierman to violate his duty as a public servant.

Penal Law § 135.60. Coercion in the second degree provides in applicable part as follows:

> "A person is guilty of coercion in the second degree when he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from

> engaging in, or to abstain from engaging in conduct in which he or she has a legal right to engage, * * * by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will:
>
> * * *
>
> "5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule;"

Penal Law § 135.65. Coercion in the first degree provides in applicable part as follows:

> "A person is guilty of coercion in the first degree when he or she commits the crime of coercion in the second degree, and when:
>
> * * *
>
> "2. He or she thereby compels or induces the victim to:
>
> * * *
>
> "(c) Violate his or her duty as a public servant."

Defendant contends that the People have failed to present legally sufficient evidence that the defendant attempted to compel or induce the alleged victim to *violate his duty as a public servant*. The Indictment alleges, and the proof before the Grand Jury was legally sufficient to show, that the defendant attempted to compel or induce Luke Bierman, Chief Counsel for the Office of the New York State Comptroller, to withdraw his opposition

to a proposed investment by the Office of the State Retirement System with FA Technology Ventures. Defendant contends that Luke Bierman's withdrawing his opposition to an investment is not inherently unlawful and cannot give rise to a violation of his duty as a public servant. Defendant further contends that Luke Bierman's general, non-mandatory, non-specific duty to use his best judgment in recommending or not recommending an investment cannot constitute a "duty as a public servant" (citing, *People v. LaCarrubba*, 46 NY2d 658 [1979] and *People v. Garson*, 6 NY3d 604 [2006]).

The Legislature's decision not to define "violate his duty as a public servant" is understandable given the hundreds of different types of public officials and public employees that the statute is intended to encompass (see, *People v. Garson*, *supra* at 612). Proof of what duty has been violated in each case "can come in the form of live testimony from a lay witness or expert, reliance on an internal or formal body of rules, or other indicia of a defendant's knowledge of wrongdoing" (*Ibid.*). This Court holds and determines that the granting of the defendant's motion to dismiss the FIRST COUNT based upon a lack of any express code of conduct or list of duties for the General Counsel to the New York State Comptroller would lead to an unreasonable or absurd application of the law (*Id.* at pg. 614) quoting *People v. Santi*, 3 NY3d 234, 244 [2004]. It was reasonable for the Grand Jury to find that were Luke Bierman to change his recommendation regarding an investment by the Retirement System based upon the threat from the defendant to expose an asserted secret sexual affair with a co-worker, such conduct

would constitute a violation of Bierman's duty as a public servant. Defendant's "vagueness as applied" challenge to the FIRST COUNT should be and the same is also hereby denied (see, *People v. Garson*, *supra* at 617; see footnote #7). *Motion to dismiss the FIRST COUNT denied.*

(2) The SECOND COUNT of the Indictment charges the defendant with Bribery in the Third Degree in violation of Penal Law § 200.00. The charge is that between the dates of November 17, 2009 and December 1, 2009, at the Office of the State Comptroller, 110 State Street, City and County of Albany, the defendant Giridhar C. Sekhar, a managing partner with FA Technology Ventures, did offer to confer a benefit upon Luke Bierman, Counsel for the New York State Comptroller, a public servant, to wit: the benefit of withholding the exposure of an alleged sexual affair involving Mr. Bierman and a co-worker—upon the agreement or understanding that Mr. Bierman's vote, opinion, judgment, action or exercise of discretion as a public servant would thereby be influenced with respect to an investment by the Office of the New York State Retirement System with FA Technology Ventures.

Penal Law § 200.00 Bribery in the third degree provides as follows:

> "A person is guilty of bribery in the third degree when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of

> discretion as a public servant will thereby be influenced."

Penal Law § 10.00 Definitions of terms of general use in this chapter provides as follows:

> "17. 'Benefit' means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary."

Defendant contends that the People have failed to present legally sufficient evidence that the defendant offered to confer or agreed to confer a "benefit" upon Luke Bierman. Defendant specifically contends that the withholding of the exposure of an alleged sexual affair involving Luke Bierman and a co-worker did not confer anything upon Luke Bierman that he did not already have—since the alleged affair was already a secret and withholding the exposure of the alleged affair would put Luke Bierman in no better position than he was already in. Defendant's arguments relating to the definition of the word "confer" actually attack the People's proof with respect to the legal meaning of the element of "benefit".

The People contend and argue that the Court of Appeals decision in *People v. Feerick*, 93 NY2d 433 [1999] is controlling under the facts of this case. In *People v. Feerick*, *supra*, the Court of Appeals held that illegally retrieving a lost police radio, where its loss could have subjected the officers to scorn, ridicule or possible discipline, can constitute an advantage or gain under the legal definition of "benefit". Rejecting the People's contention, this

Court holds and determines that defendant's offer to keep Luke Bierman's alleged sexual affair with a co-worker a secret—the disclosure of which would tend to subject Luke Bierman to scorn, ridicule, or possible discipline—does *NOT* constitute legally sufficient evidence that defendant offered to *confer* a "*benefit*" upon Luke Bierman. Furthermore, if such secret or asserted fact (sexual affair with co-worker) were *untrue*, the defendant herein cannot reasonably and logically be determined to have *conferred* a "*benefit*" upon Bierman by *not* exposing a *false* asserted fact (sexual affair with co-worker).

This Court further holds and determines that coercion and bribery are mutually exclusive concepts—as each such crime is explicitly defined in provisions of the Penal Law. To offer another person money to do something is bribery, *not* coercion. To threaten to physically harm another person if he or she doesn't do something is coercion, *not* bribery—even though not being physically harmed is arguably a "benefit." Stretching the People's argument herein to its logical extreme, suppose that a defendant threatens a judge that if he or she does not grant his motion to dismiss an indictment, such defendant will kill the judge. Under the People's theory, such defendant (clearly guilty of coercion or attempted coercion) would also be guilty of bribery—conferring upon the judge the intangible "benefit" (i.e. gain or advantage) of not being dead.

Furthermore, Penal Law § 135.70. Coercion; no defense provides in applicable part as follows:

> "The crimes of (a) coercion and attempt to commit coercion, and (b) * * * *bribe*

> *receiving* as defined in section 200.05, are not mutually exclusive, and it is no defense to a prosecution for coercion or an attempt to commit coercion that, by reason of the same conduct, the defendant also committed one of such specified crimes of *bribe receiving*." (emphasis supplied)

And Penal Law § 200.15. Bribe receiving; no defense provides in applicable part as follows:

> "1. The crimes of (a) *bribe receiving*, and (b) larceny committed by means of extortion, attempt to commit the same, coercion and attempt to commit coercion, are not mutually exclusive, and it is of no defense to a prosecution for *bribe receiving* that, by reason of the same conduct, the defendant also committed one of such other specified crimes." (emphasis supplied)

The foregoing discrete sections of the Penal Law clearly buttress this Court's determination that the crime of (a) *bribery* and the crimes of (b) coercion and attempt to commit coercion *are mutually exclusive*. If the crime of (a) bribery and the crimes of (b) coercion and attempt to commit coercion were *not* mutually exclusive, the Legislature clearly would have said so in the Penal Law. *Motion granted to dismiss SECOND COUNT as defective and as not supported by legally sufficient evidence granted.*

The People are denied leave to represent such charge to another Grand Jury.

The Court has inspected the *FIRST COUNT* of the Indictment and finds that it substantially

conforms to the requirements stated in Article 200 of the Criminal Procedure Law. *Motion to dismiss the FIRST COUNT of the Indictment denied.*

The Court finds that the proceedings before the Grand Jury substantially conformed to the requirements of Article 190 of the Criminal Procedure Law. *Motion to dismiss Indictment denied.*

6. SUPPRESSION OF STATEMENTS

A *Huntley* hearing will be held at a time appointed by the Court.

7. SUPPRESSION OF TANGIBLE PROPERTY

A *Mapp* hearing will be held at a time appointed by the Court (see, *People v. Bryant*, 8 NY3d 530 [2007]).

8. PRECLUSION OF STATEMENTS FOR LACK OF CPL § 710.30 NOTICE

Defendant seeks preclusion of any *unnoticed statements* allegedly made by defendant to law enforcement personnel owing to the lack of CPL § 710.30 notice served by the People. In response, the People assert that the People have complied with the CPL § 710.30 notice requirements. *Motion granted as to any unnoticed statements.*

9. BILL OF PARTICULARS

Defendant has attached a copy of his Request for a Bill of Particulars to his Omnibus motion (Exhibit B) and has moved this Court for an order directing the People to provide the requested information. The People have failed to respond. This Court holds and determines that the People are hereby ordered to

provide the defendant with a response to the defendant's Request for a Bill of Particulars within 15 days from the date of receipt of this Decision/Order. *Motion granted.*

10. DISCOVERY

The defendant contends that the People have refused to comply with paragraph 12(n) of the defendant's Demand to Produce. Paragraph 12(n) of defendant's Demand to Produce requests information in the possession of the New York State Comptroller's Office relating to the decision not to invest with FA Technology Ventures. Defendant contends that such property and material will contain *Brady* material indicating that Luke Bierman's recommendation *not* to invest with FA Technology Ventures was based upon reasons relating to Comptroller Thomas DiNapoli's bid for election, rather than upon the merit of the investment—thereby undermining the People's claim that Luke Bierman was acting as a public servant in advising against the investment and would have violated his duty as a public servant if he changed his recommendation based upon the threatened disclosure of an alleged sexual affair with a co-worker. The People have merely answered that they have responded to defendant's Demand to Produce.

Neither the defendant nor this Court is in the position to know whether any of the property and material requested from the New York State Comptroller's Office contains *Brady* material. Should such property exist, this Court finds that it could very well constitute *Brady* material. Accordingly, even though such property is apparently *not* in the

possession of the Albany County District Attorney, this Court holds and determines that the People are under a duty to retrieve such property and provide it to the defendant (CPL § 240.20(1)(h)). If there is any question as to whether or not some of the requested property constitutes *Brady* material, the People are directed to provide those limited documents, *where there is a legitimate question*, to the Court for *in camera* inspection.

11. *SANDOVAL* HEARING

A *Sandoval* hearing will be held before the trial judge prior to trial.

12. RESERVATION OF RIGHTS AND OTHER MOTIONS

Any further motions are governed by the provisions of CPL § 255.20(3).

The foregoing constitutes the Opinion, Decision and Order of the Court.

ENTER

Dated: Albany, New York
June 30, 2010

DAN LAMONT, Acting J.S.C.

cc: Eric M. Galarneau, Esq., Asst. Dist. Atty.
[Handwritten: checkmark] Paul A. Clyne, Esq.

* * *

Attachment to Defense Motion for Omnibus Relief, *United States v. Sekhar*, No. 10-573 (N.D.N.Y. filed Jan. 10, 2011) (Dkt. 13-19)

STATE OF NEW YORK COUNTY COURT
COUNTY OF ALBANY

Index # DA 115-10

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

GIRI SEKHAR,

Defendant.

October 27, 2010

AFFIRMATION

ERIC M. GALARNEAU, a duly licensed and practicing attorney of the State of New York, affirms as follows under penalty of perjury:

1. I am an Assistant District Attorney of Albany County, New York, and that in such capacity, am fully familiar with the facts and circumstances of this action.

2. I submit this Affirmation in support of the People's Motion to dismiss the above captioned action in the furtherance of justice.

3. On or about February 2, 2010, a Grand Jury for the Supreme Court of the County of Albany, New York returned a two count indictment charging the

defendant with Attempted Coercion in the First Degree and Bribery in the Third Degree. Upon motion of the defendant, the Court thereafter dismissed the second count of the indictment, but upheld the first count in the face of opposition from the defendant, who contended that his conduct constituted, at best, an Attempted Coercion in the Second Degree, a Class B Misdemeanor.

4. In response to the dismissal of half of indictment, the People sought to refer the matter to the United States Attorney for the Northern District of New York on the grounds that the defendant's alleged conduct fell more appropriately within the purview of federal criminal proscriptions. The People repeatedly advised the Court and counsel of the possible referral, but, at the insistence of Court and counsel, went forward with a suppression hearing scheduled by the Court.

5. During this same period of time, the defendant, through his attorneys Paul A. Clyne and William Dreyer, attempted to forestall federal action by meeting with federal authorities in an effort to convince them not to adopt the case. In fact, I am advised by AUSA Tina Sciocchetti, that in early August, 2010, she advised Paul Clyne that although there was probable cause to file a federal complaint, she would defer action in order to give the defendant an opportunity to meet with the US Attorney to discuss whether federal charges were appropriately lodged.

6. Two meetings were held for this purpose. The first occurred on August 17, 2010, when Paul Clyne and William Dreyer met with AUSA Sciocchetti and

case agents. At the meeting, Dreyer asked for a chance to put something in writing, and was giving an opportunity to do so. He submitted his letter and later met with US Attorneys again to discuss the case on September 29th. At that meeting, Criminal Chief Steve Clymer came in from Syracuse to meet with Dreyer, AUSA Sciocchetti and the FBI about whether US Attorney should bring charges.

7. Following these meetings, and a review of Dreyer's proffer letter, the US Attorney decided in early October that federal charges were appropriately lodged and notified Dreyer. In response, Dryer claimed that he was interested in a pre-indictment plea. Pre-indictment negotiations have been taking place since then, and the defendant has been notified that the US Attorney will seek an indictment on November 4 if a pre-indictment settlement is not reached.

8. In the meantime, a criminal complaint was filed in the United States District Court for the Northern District of New York on October 22, 2010. A copy of the complaint is attached hereto and made a part hereof. The state case also proceeded with the suppression hearing, and the People continued to keep the Court and counsel abreast of any developments in the possible federal actions, as evidenced by my letters dated August 5, 2010 and October 15, 2010.

9. In light of the federal action, the People have moved for dismissal of the sole remaining count of the indictment in the furtherance of justice. It is proper to do so in this case. In considering a motion to dismiss in the furtherance of justice, the Court

must consider a number of statutory factors pursuant to CPL § 210.40. These are:

"(a) the seriousness and circumstances of the offense;

(b) the extent of harm caused by the offense;

(c) the evidence of guilt, whether admissible or inadmissible at trial;

(d) the history, character, and condition of the defendant;

(e) any exceptionally serious misconduct of law enforcement personnel in the investigation and prosecution of the defendant;

(f) the purpose and effect of imposing on the defendant a sentence authorized for the offense;

(g) the impact of a dismissal upon the confidence of the public in the criminal justice system;

(h) the impact of a dismissal on the safety or welfare of the community;

(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;

(j) and *any other fact indicating* that a judgment of conviction would serve no useful purpose".

10. In this case, a dismissal in the interest of justice is appropriate in light of the concurrent federal action. Nor, given the Albany County District

Attorney's current posture that they do not wish to go forward with the state prosecution under the circumstances, would a continued state prosecution serve *any useful purpose* other than to elicit an improper *advisory opinion* from this Court as to evidentiary matters that will also be litigated in federal court. Indeed, it is respectfully submitted that the defendant is only interested in obtaining this improper advisory opinion. Such an interest is insufficient to justify the continuation of dual—and, in many cases, redundant—prosecutions.

11. An advisory opinion is especially problematic in this case because the trial Court will be called on to address a number of unsettled issues. Issues as to whether New York or Massachusetts state law will govern the matter of the Brookline search warrant, or which state's laws will properly be invoked to determine whether the defendant was in custody for purposes of *Miranda*, or whether his the Fifth Amendment Right to Counsel or indelible (in New York) right to counsel had ripened and/or attached, will have a significant bearing on the course of any ruling on the defendant's suppression motion. To issue an advisory opinion under such circumstances will not further the interests of justice, and will confound, rather than conclude, the issues at stake.

12. Finally, it is worth nothing that it is the District Attorney who is entrusted with the decision as to who and who not to prosecute (*People v. DiFalco*, *supra*; *see also Matter of Walthour*, *supra* [noting that "[t]his court is therefore not in a position to exercise supervisory authority over law enforcement officials, but rather must limit its

oversight to a retrospective review to ensure that the constitution [or statute] has not been breeched."]). Here, it is the District Attorney who decides whether to levy charges against the defendant (*id.*; *People v. Marrero*, 8 Misc.3d 172, 178-179 [NY Sup. Ct. 2005]) and "who, what and when to prosecute". (*People ex rel. Doe v. Beaudoin*, *supra*). In this case, the People have elected, based on the circumstances set forth herein, to discontinue the prosecution of the above captioned case. For that reason alone, it is respectfully submitted that the sole remaining count of the indictment should be dismissed in the furtherance of justice.

WHEREFORE, your affiant respectfully requests that the prayed for relief, except as consented to, be in all respects, denied.

DATED: Albany, New York
October 27, 2010

ERIC M. GALARNEAU
Assistant District Attorney

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Criminal No. 10-CR-0573-TJM

UNITED STATES OF AMERICA,

v.

GIRIDHAR C. SEKHAR,

Defendant.

Filed December 3, 2010
Seven Felony Counts
[VIO: 18 U.S.C. § 1951(a) & 18 U.S.C. § 875(d)]
[County of Offense: Albany]

INDICTMENT

COUNT ONE
(Extortion)

INTRODUCTION

At all times material to this Indictment:

1. FA Technology Ventures Corporation ("FA Technology") was a venture capital and private equity investment company with offices in Boston, Massachusetts and Albany, New York.

2. The defendant, GIRIDHAR C. SEKHAR, was employed as a managing partner of FA Technology and resided in Brookline, Massachusetts.

3. The New York State Common Retirement Fund held assets in trust for public employees, and, as its sole trustee and manager, the New York State Comptroller, relying on his staff in the Office of the Comptroller, including, among others, his General Counsel (the "General Counsel"), decided whether to commit to proposed investments of the New York State Common Retirement Fund's assets generating, among other things, management fees and a percentage of profits earned for the entities investing the assets.

THE PROPOSED FA TECHNOLOGY COMMITMENT

4. In or about October 2009, the Comptroller and his staff, including the General Counsel, were considering whether the Comptroller should commit to invest $35 million of Common Retirement Fund assets in funds managed by FA Technology (the "Commitment"). If the Comptroller had made the Commitment, then FA Technology, either directly or through one of its funds, would have earned management fees and a percentage of profits generated.

5. In or about November 2009, following the General Counsel's October 26, 2009 recommendation that the Commitment not be approved, the Comptroller or his staff decided not to approve the Commitment, and the Comptroller's staff informally advised FA Technology of the decision.

6. From on or about November 17, 2009 and continuing through on or about December 1, 2009, in

the State and Northern District of New York and elsewhere, the defendant,

GIRIDHAR C. SEKHAR

did affect and attempt to affect commerce by extortion, that is by attempting to obtain property from another with his consent induced by the wrongful use of fear and threatened fear, to wit, the defendant did attempt to obtain the Commitment, the Comptroller's approval of the Commitment, and the General Counsel's recommendation to approve the Commitment, with the General Counsel's consent, induced by threatening to disclose the General Counsel's alleged extramarital affair.

All in violation of Title 18, United States Code, Section 1951(a).

COUNTS TWO THROUGH SEVEN
(Interstate Transmission of an Extortionate Threat)

7. Paragraphs One through Six are hereby realleged and incorporated by reference as if fully set forth herein.

8. On or about the following dates, in the State and Northern District of New York and elsewhere, the defendant,

GIRIDHAR C. SEKHAR

knowingly and with the intent to extort from any person, firm, association, or corporation a thing of value, transmitted in interstate commerce a communication containing a threat to injure the reputation of the addressee, to wit, the defendant, knowingly and with the intent to extort (1) from the Comptroller (a) the Commitment, (b) approval of the

Commitment, and (c) the General Counsel's recommendation to approve the Commitment, and (2) from the General Counsel his recommendation to approve the Commitment, transmitted electronic mail messages to the General Counsel using the electronic mail address nyethics@yahoo.com threatening to injure the General Counsel's reputation by disclosing the General Counsel's alleged extramarital affair, and those electronic mail messages traveled from, through, and to the following locations:

Count	Date	From/Through	To
Two	11/18/09	Jersey City, NJ	Albany, NY
Three	11/18/09	Brookline, MA	Albany, NY
Four	11/19/09	Brookline, MA	Albany, NY
Five	11/19/09	Jersey City, NJ	Albany, NY
Six	11/23/09	Jersey City, NJ	Albany, NY
Seven	12/1/09	Brookline, MA	Albany, NY

All in violation of Title 18, United States Code, Section 875(d).

RICHARD S. HARTUNIAN
UNITED STATES ATTORNEY

By: _____
Elizabeth C. Coombe
Assistant U.S. Attorney
NDNY Bar Roll Number 511925

Excerpts from Jury Trial Transcripts
N.D.N.Y. No. 10-CR-573
April 13, 2011

[7] *Government's Opening Statement*

* * * the opening statement is like dumping the pieces of puzzle onto a table and if you don't have the picture in front of you, if you turn that over and you don't see what the pieces look like assembled, it's gonna be much harder for you to understand each piece as it's presented to you. So if you're allowed to look at the front of the puzzle box via the opening statement, it's gonna be easier for you to figure out why they're callin' what witnesses and why they're sayin' what they're saying. That's just an analogy I make, nothin' you have to follow, but it's the way I like to think about it.

So, Miss Coombe, are you ready to make your opening statement for the jury?

MS. COOMBE: I am, your Honor.

THE COURT: You may do that now.

MS. COOMBE: Thank you.

Good morning, ladies and gentlemen. This case is about extortion. It's about how that man, Giridhar Sekhar, sent e-mails to the General Counsel for the Comptroller of New York State. In those e-mails, he claimed that he had enough evidence to prove that the General Counsel was having an extramarital affair and he told the General Counsel, "If you don't do what I want you to do, then I am going to reveal that extramarital affair." And what he wanted the General Counsel to do is to reverse his

recommendation that [8] the Comptroller of New York State not approve a $35 million investment with Mr. Sekhar's company.

Ladies and gentlemen, it all started back on November 17th of 2009. You're going to see and hear evidence that on that day, the General Counsel, whose name is Luke Bierman, received an e-mail message from someone who claimed to be an employee at the State Comptroller's office. In the e-mail message, the person writing it said they had a serious ethics issue to bring to someone's attention and they wanted to bring it to Mr. Bierman's attention. And the writer asked, "Could you please provide me with a private e-mail address?" And the e-mail was from an account called nyethics@yahoo.com. You'll hear that Mr. Bierman wrote back. He said if you have that kind of issue, you should really take it up with the Inspector General for the New York State Comptroller's office, but here's my private e-mail address if you want to handle it that way.

The threatening e-mail started the next day when Mr. Bierman received an e-mail message that said that the writer claimed that he could prove that Mr. Bierman had a tryst with one of his colleagues, that he could prove it and that he wanted Mr. Bierman to reverse his recommendation that the Comptroller not approve that $35 million commitment.

He said that if the General Counsel did not do [9] what he wanted him to do, then he was gonna reveal the extramarital affair, which he said he could prove, and he said he was gonna reveal it first to Mr.

Bierman's wife, then to someone else, then he was gonna reveal it to his boss, the Comptroller, and then after that, the Attorney General for New York State and finally The Times Union.

Over the next two weeks, Mr. Bierman continued to receive e-mail messages from nyethics@yahoo.com and those messages repeatedly asked him to do what was being asked which was to reverse his recommendation about that commitment of $35 million. And you will hear that just before this e-mail started in late October, Mr. Bierman had recommended to the Comptroller, who it's his job to decide what investments are actually made, he had recommended that this particular commitment not be approved. And you will also hear that after he made that recommendation, the Comptroller decided not to go forward with the commitment.

After Mr. Bierman received the e-mail, he contacted law enforcement and you'll hear from law enforcement officers about how they used the information in the e-mail. And I didn't know this, ladies and gentlemen, but when you get an e-mail, you can print out a big copy of something called a header and in it is something called an IP address, internet protocol address, and it's a unique address that can be used to trace back who sent a particular
* * *

[92] *Bierman – Direct - Coombe*

* * * document is received as redacted, you are to treat that as a document as if it were not redacted and not worry about what the redacted part is 'cause it's not relevant to your decision.

MS. COOMBE: Thank you, your Honor.

THE COURT: You're welcome.

BY MS. COOMBE:

Q: This is Government's Exhibit 4-A and this is an e-mail that—first of all, before I move on all of the e-mail that I sent you, I can bring them back up again—I mean I showed you, I can bring them back up again, but where were you when you received all those e-mail messages?

A: Here in Albany.

Q: Okay. Exhibit 4-A, this is a message dated November 18, 10:42 AM, from msnyethics@yahoo.com to your gmail. It says, "Dear Mr. Bierman, I am glad we are handling this ethics situation through your personal e-mail because this ethics issue involves you. And I am bringing it to your attention because I sincerely don't want you to get hurt and it would be bad if anyone in your office read this, even your secretary. Last week, you did something that was wrong. You blackballed a recommendation on a fund from the investment staff because they had a relationship with a friend of mine."

Do you have any understanding about what this [93] reference was to?

A: I assume this was to the FA Tech investment and consideration.

Q: "You implied that this friend was dirty." And do you have any understanding about who this friend is that's being referred to?

A: The placement agent or one of the people in the partnership. There was a placement agent and that was Pat Lynch.

Q: "And that TD should stay away for political reasons." And again TD, you understand those initials to refer to the Comptroller?

A: Comptroller DiNapoli, yes.

Q: "That is just wrong and unethical and it undermines the function of this office. My friend has been a public servant in New York for a long time and she has done many great things to help the public and the poor. She has helped me out and I know her to be a great ethical person. Just because you don't like her, you can't just blackball any group that has ever known her or done business with her. People in the office are depressed because they feel that one form of corruption, pay to play, is now being replaced by a different form of corruption, the politics of personal destruction. I can't take the atmosphere of politics, distrust and depression anymore. You accuse her [94] of being dirty, but you saw nothing unethical in having an affair with the blank. I know about your tryst with blank and I have more than enough to prove it, including messages and witnesses. How could you do such a thing? We have enough trouble that we need you fooling around with the blank? I find it so dirty and disgusting. Do you realize how this affair has stalled activity in our office and created a hostile work environment?"

THE COURT: Can we go to side bar for just a minute?

MS. COOMBE: Yes, your Honor.

(At side bar:)

THE COURT: I don't know if the jury sees the same copy that I do, but when he's talkin' about the affair, it refers to counsel.

MS. COOMBE: Obviously that one was missed.

THE COURT: You just missed it.

MS. COOMBE: Yeah. How about if I black it out now?

THE COURT: You can.

MS. COOMBE: Yeah.

THE COURT: Just wanted to—

MS. COOMBE: I know, your Honor.

(In open court:)

[95] BY MS. COOMBE:

Q: It goes on, "We have enough trouble that we need you fooling around with blank? I find it so dirty and disgusting. Do you realize how this affair has stalled activity in our office and created a hostile work environment? How are people supposed to work when we don't know who is whispering what to who in the bedroom? I am not here to make money off you or to cause you any trouble. I just want the madness in this office to end and I need you to make a fix. Here's what I want you to do. Go to TD, MLM, RE, GK and blank, et al., and tell them you've had a few days to think things over and have had a change of heart." You already testified about TD, MLM. Do you have any understanding of who RE refers to?

A: Raudline Etienne, the Chief Investment Officer.

Q: And how about GK?

A: I assume George King, the Inspector General.

Q: "You now recommend moving forward with this fund and accepting the decision of the investment staff." What is your understanding of what you were being asked to do here?

A: I took it to mean I should alter the recommendation I made in the memo so that the objection I had as a legal matter would no longer be an objection.

Q: "Number two, you will make a reason such as you [96] reviewed the files and realized that this fund is very important to the in-state investing program because they are so active in upstate New York and have created so many jobs. You now believe that to not do this fund would cause terrible disaster to the in-state investing program and that there is a great political liability to TD to do so. Three, you will reverse your terrible statements on my friend and say positive things. You need to do this by this Friday, November 20th. If you do not do so by Friday, each day I will release the blank information to a different person in your life the following week. By Monday to Laura." Do you have any understanding of who the Laura is referring to?

A: I assume that referred to my spouse.

Q: "By Tuesday to blank," and then it continues on the next page. "By Wednesday to TD, by Thursday to the Inspector General, by Friday to Cuomo, by

Monday week after to the Albany Times-Union. It will make a juicy story about an ethics scandal in the blank. I am sure in your paranoia you will try to figure out who I am, but I am not who you think I am. I am the quiet one who doesn't have a big job or make a lot of money. I like people and I don't like to see good people hurt. I am not going to be a pest in your life or a dark cloud hanging over your head. I just want to see evidence that you're a person who can do the right thing. Don't look for me. Don't try to figure out who sent [97] this to you. If you do, the files will be sent to Cuomo, et al. You should just go about your normal workday and you will never hear about this again. I promise you that I'm not out to get you or keep sending you dark e-mails. I just want our office to function normally."

What was your reaction when you received this e-mail message?

A: I was appalled, I was upset, I was concerned about what was being asked to be done and I probably had those reactions with far more saltier language than I just expressed.

Q: Did you report this e-mail to anyone at the Comptroller's office?

A: I did. I reported it to the Inspector General, which is consistent with the policies that we had in place at the time for reporting what appeared to be criminal conduct.

Q: Okay. I'd like to look at now Government's Exhibit 5-A. This is an e-mail dated November 18th of 2009 at 8:42 PM. And it's from that nyethics@yahoo.com account to you at both home and

work e-mail addresses. And it says, "36 hours left to make the wrong right." What was your understanding about what this e-mail was referring to?

A: To do the things that had been indicated in the prior e-mail in the time limit that had been set, the sort [98] of parameters of what would happen over a course of a period of time.

Q: What was your reaction to this e-mail?

A: Same thing, that this was an ongoing appalling situation that needed to be dealt with.

Q: What did you understand nyethics was seeking from you by this e-mail?

A: To do the things in the prior e-mail, to reverse the recommendation that I had made on the FA Tech III fund.

THE COURT: All right, ladies and gentlemen, it's 12:30, we are gonna take a break. See you back at 1:30.

* * *

[111] * * * BY MS. COOMBE:

Q: Showing you now, Mr. Bierman, Government's Exhibit 6-A, this is an e-mail message dated November 19th of 2009 at 7:13 AM. And it's from nyethics@yahoo.com to both of your e-mail addresses. It says, "24 hours left," and it appears to be—it has underneath it "36 hours left to make the wrong right."

[112] What did you understand the person sending this e-mail was trying to get you to do?

A: I assumed, as with the prior e-mail, 36 hours left, I had 24 hours left to change my mind and alter the opinion that I had given to counsel that I had given on the FA Tech investment.

Q: What was your reaction to receiving this e-mail?

A: Again, the whole thing was troubling, appalling to me. You know, I had done my duty as I saw fit and this was trying to have me do something different than what I believed was in the best interest of the fiduciary duty I had to the million pensioners and members of the system and my responsibility to the Comptroller of the State of New York. I was—the whole thing was really appalling to me.

Q: Did you have any concern about your reputation?

A: I was concerned about my professional relationships and reputation, my personal relationships and reputation. The whole—from soup to nuts this was troubling to me, the whole thing.

Q: And that applies to all the e-mails we've looked at so far?

A: That's correct.

Q: Mr. Bierman, I'm showing you Government Exhibits 7-A and 7-B. Would you please take a look at those and tell us if you recognize them?

[113] A: Yes, I do.

Q: Would you start with Exhibit 7-A; what is it?

A: This is another e-mail that I received as part of this series of e-mails.

Q: And how about 7-B?

A: Likewise, it's that e-mail with the additional header information that we've described.

Q: Are they fair and accurate copies of the e-mails that you received?

A: Again, there's some redaction, some blacking out of some information, but other than that, yes, they are—appear to be what I received.

MS. COOMBE: Your Honor, the Government moves the admission of Exhibits 7-A and 7-B.

THE COURT: Subject to defendant's redaction, is that okay with you?

MR. SEKHAR: Yes, sir.

THE COURT: All right. Receive Government's 7-A and 7-B in evidence.

(Government Exhibits 7-A & B received.)

BY MS. COOMBE:

Q: Mr. Bierman, this is an e-mail message to you at both of your addresses. It's to—from msnyethics@yahoo.com the subject line is draft letter to AG. It was sent November 19, 2009, at 1:29 PM. Says, "Dear [114] Luke, I would like to get your guidance to write my letter to the AG. You are an expert in the law and you are a better writer. I have started my draft. Can you comment on it so it can be in good shape when I send it out next week? If you don't like this draft, see below, then you should

forward with the other solution that"—I am sorry—"then you should go forward with the other solution that I suggested in the other e-mail from yesterday. That might put a quick end to the problem."

What was your understanding about the other solution that the writer was referring to?

A: Again, I took it to mean that I should change my mind on the advice that I had given earlier and retract what I had said about not going forward with the investment in FA Tech.

Q: The letter continues on, "Dear Mr. Cuomo, I am writing to expose a very troubling situation here at the New York State Comptroller's office. Your office has done so much to clear up graft and corruption at the pension fund. Tom DiNapoli has taken your lead and instituted policies and procedures to make sure that pay to play never takes hold again. One of the key things he has done is institute an office for ethics to vet questionable situations. Here is the problem: Blank was appointed the blank in 2007. Her job was to help restore the public's confidence at the [115] Comptroller's office. How is that possible when she has engaged in an illicit extramarital affair with blank who is the General Counsel? This affair has had a tremendous negative impact on the functioning of the Comptroller's office. I have made a partial list of the problems this immoral behavior is causing. One, creation of a hostile work environment and a sexualization of everyday office business. Two, loss of trust in the office of blank. Three, loss of trust in the General Counsel. Four, backlog of investment commitments that the office cannot process as the

relationship between the two attorneys holds up business on a regular basis. Five, loss of trust in general office communications. The belief that the walls have ears and that secrets are shared in the bedroom. Six, loss of the services paid for by New York taxpayers of these two employees as they diverted paid time to their personal relationship. Seven, increased politicalization and creation of enemies list holding up approval of wise investments vetted by the investment staff. This is just a first draft. Luke, can you add or edit the content as you see appropriate? I really need this turned quickly since we only have 12 more hours left."

What was your understanding about what this referred to?

A: Again, from the first e-mail, there were 12 hours [116] left for me to change my mind or, you know, this letter would be sent.

Q: And what was your reaction to this e-mail?

A: You know, it just got worse along the way as it appeared to be more explicit threat and more—the whole thing was just—I was, again, concerned about the same things. It's more and more of the same thing.

Q: Did you write back to the person?

A: At some point, I did write back. By this time, law enforcement had become involved and, in consultation, I wrote back and said—yes, I did write back at some point. Again, law enforcement had become involved, there had been meetings and some

discussions had been had, you know, about what to do.

Q: And was it recommended that you write back?

A: It was, yes.

(Pause in proceedings.)

BY MS. COOMBE:

Q: Mr. Bierman, I am going to show you what I've marked as Government Exhibit 8-A. Do you recognize this?

A: Yes, I do.

Q: What is it?

A: This is an e-mail that I sent back to the New York ethics e-mail address.

Q: Other than the redaction, is this an accurate copy [117] of the e-mail message that you sent back?

A: Yes, it is.

MS. COOMBE: Your Honor, the Government moves the admission of Government Exhibit 8-A.

MR. SEKHAR: No objection.

THE COURT: Receive Government's 8-A in evidence.

(Government Exhibit 8-A received.)

BY MS. COOMBE:

Q: Mr. Bierman, this is a message that you wrote back, the time is November 20, 2009, at 3:05 PM. And it's from you at your gmail account to msnyethics@yahoo.com. Says, "I have been working

on this matter but find it will take longer to resolve than today due to the difficulty in availability of the necessary folks. I will continue working on this through the weekend and Monday as I can get with those necessary people. I will advise as things progress."

What were you trying to communicate there?

A: That I was working on the suggestion that had been made that I should think about altering my opinion and that I should communicate to specific people that I was altering my opinion. I was trying to essentially gain some time from the deadline that had been set.

Q: Mr. Bierman, I am showing you Government Exhibit 9-A. This is dated November 23, 2009, at 7:19 PM. It's [118] from msnyethics@yahoo.com to your gmail account. Says, "Thank you, Mr. Bierman. I have heard as such through other channels and won't expect anything to change until Wednesday. I feel really badly about our exchanges, but she is someone I owe a personal debt to who helped me out when I was down. If you can get this fixed by Wednesday, you will never hear about this again."

What was your understanding about the "she" that the writer was referring to?

A: The placement agent that was involved in this, Pat Lynch.

Q: What was your understanding about what was meant by "if you can get this fixed by Wednesday"?

A: Again, alter it, alter my opinion, get the folks who were involved, my colleagues who were involved to understand that I was changing the opinion that I had rendered so that they would approve the transaction.

Q: And I take it you had the same reaction to this e-mail?

A: We were "Luke," then "Mr. Bierman." The whole thing was just appalling to me. Yes, the same reaction.

Q: This is Government's Exhibit 10-A. This is dated December 1, 2009, at 8:05 AM. Says, "Progress report," it's from nyethics@yahoo.com to you at your state and gmail addresses. Says, "Hope you had a great holiday. What do [119] you think of that Tiger Woods story? Who would have thought that a woman could get that upset, and over what?" What was your understanding of what this referred to?

A: If you recall, this was over the Thanks—this was all sort of happening right before Thanksgiving and over Thanksgiving of 2009, which is when the whole Tiger Woods story broke over that holiday and you know the thing just became surreal to start, you know, bringing up that sort of thing. I thought it was referring again, threatening, consistent with the threats that had been made previously.

Q: And did you have any understanding about what the writer was seeking?

A: Again, to get me to change my opinion on the investment so that it would go forward.

Q: And what was your reaction?

A: More of the same.

Q: Did you receive any additional e-mail message from nyethics@yahoo.com?

A: I believe this was the last one.

Q: Did you ever have any contact with someone named Gregory Hulecki?

A: Yes, I did.

Q: Who was Mr. Hulecki?

A: I believe he was the president of FA Tech or the managing partner. He was the head of FA Technology.

[120] Q: When did you talk to him?

A: There was right—if I get the timing right. On the 13th is when we met with the Comptroller. Sometime after that, I think it would have been before Thanksgiving, I had had a message that he had called, I believe one of my colleagues had said that he was going to call, and we set up a meeting time during—I believe it was a couple of days right before Thanksgiving.

Q: Did you wind up meeting with him?

A: Yes.

Q: During that meeting, did you have any understanding about whether Mr. Hulecki was aware of the Comptroller's decision regarding FATV III?

A: Yes.

MR. SEKHAR: Objection on hearsay. Comptroller has not testified yet.

THE COURT: Well, that—I just don't think the witness can be asked to testify what was in Mr. Hulecki's mind.

MS. COOMBE: Your Honor, it falls within 801(d)(2), there was a joint venture to acquire the contract, Mr. Sekhar was a partner.

THE COURT: If I let that in pursuant to the rules of spoken testimony, are you gonna be able to establish that there was such a group?

* * *

[124] MR. SEKHAR: I may not. I don't have to.

THE COURT: No, you don't. Let's go.

MR. SEKHAR: Okay, thanks, Judge.

(In open court:)

BY MS. COOMBE:

Q: Mr. Bierman, did you ever learn whether Mr. Hulecki was aware of the Comptroller's decision regarding the FATV III fund?

A: It was part of the topic of conversation when we met.

Q: What did he say?

A: He sort of laid out a case why it was important to have the investment, that the company was dependent upon the funds that were expected, you know, this was a big part of what FA Tech was about and their ongoing ability to function as an investment company.

Q: And did he talk about whether he was aware that the Comptroller had decided not to go forward with the commitment?

A: Yes, he was aware, he was again sort of making the case why it was important, indicated that if they didn't get those funds that the company might not be able to continue to function and have liens and pay people. The conversation was sort of in that regard, that they needed the money.

(Pause in proceedings.)

[125] BY MS. COOMBE:

Q: Mr. Bierman, I am going to show you what's been marked as Government Exhibit Number 19-A, it's already been admitted into evidence, I just want to let you have a chance to look through it.

A: (Pause.) Okay.

Q: Okay. I'd like to direct you to—first of all, let me show you the first page, it's a memorandum dated October 20, 2009, from a Tom McGrath to Raudline Etienne and its subject is FA Technology Ventures III. Can you tell us who Tom MxGrath is?

A: He is with the Office of the Comptroller. I don't know his title, he was investment manager. He was in charge of the private equity space of working on possible potential investments, reviewing companies, reviewing—involved in relationships with those potential investments and actual ongoing investments.

Q: Okay. I'd like to direct your attention to page 8, there's a chart that has the proposed terms for FATV III?

A: Okay.

Q: Do you see there's—were there any provisions about any fees that FA Technology Ventures would earn from this fund, FATV III?

A: Yes. This would indicate management fees, fee [126] sharing, yes.

Q: And can you tell us what the management fee was anticipated to be?

A: Two-and-a-half percent of committed capital during the investment period stepped down to 90 percent of the fees going forward.

Q: And the term was to be ten years?

A: Yes.

Q: And do you have any understanding of whether there was any other fees that FA Technology Ventures might be able to earn?

A: Usually there's a split of any profit, during the course and at the end of the fund, profits are split between the various partners, the Common Retirement Fund, typically a limited partner and the manager, a general partner, so there would be a split of partnership profits at the conclusion.

Q: Would it be typical—you had mentioned that there was more than one investment fund, FATV III, one that could go just to New York and one that would be for outside of New York as well?

A: Right.

Q: Would it be typical for the fee structure to be the same for both?

A: Roughly.

* * *

[191] *Bierman - Cross - Sekhar*

* * *

Q: Okay. Do you know why—do you know what happened to FA Technology Ventures II?

A: No. I know it didn't close. If you're asking why or those kinds of—no, I don't.

Q: And do you know when the commitment was approved for that investment?

A: I don't.

Q: Was it around sometime April 2008, does that sound right?

[192] A: That makes sense. I don't know though.

Q: Okay. And you would agree that for FA Technology Ventures III, there had been no finalization of business terms, correct?

A: That's correct. FA Tech III. Your question—I'm sorry, your question was FA Tech III there was no finalization of business terms?

Q: Right.

A: That's my understanding.

* * *

[195] * * * Comptroller, because it's his decision.

Q: Okay. That's fine. Thank you. Now, I would like to refer back to one of the Government Exhibits.

(Pause in proceedings.)

MR. SEKHAR: Just give me one second, Mr. Bierman.

(Pause in proceedings.)

BY MR. SEKHAR:

Q: So, Mr. Bierman, based on—we've had a long discussion about the investment process and you've repeated several times sort of where you get involved, and it's fair to say that you don't have any authority to release funds for the pension fund, correct?

A: As General Counsel?

Q: That's correct.

A: My duties did not typically involve that, that's correct.

Q: I guess my question is very specific: Do you have any authority to do so?

A: My designation as General Counsel allowed me to act in ways that the Comptroller could act. I did not have to do that during the course of my tenure as General Counsel, but my designation did permit me to do that. In other words, the designation gave me some of the duties and responsibilities of the Comptroller, but I never had to exercise those duties and activities. This was sort of a [196] succession thing. The way that it worked was that if the Comptroller was unavailable, ill, if the Comptroller died then the First Deputy would become the acting or serve as the Comptroller, and her designation likewise and my designation, I was third in line, like the, what, Speaker of the House or somethin' like that.

Q: Right.

A: So the designation actually did provide for it under some circumstances, but no, I did not act in that manner.

Q: Okay. So, I want to make sure I understand. What you're saying is, and I don't mean to be morbid about this, but your authority to release funds only exists if Tom DiNapoli dies and the First Deputy, who is Mary Louise Mallick, dies, right?

A: Roughly, yes.

Q: I didn't mean to be morbid about it, but absent their passing away, yes or no, did you have any authority to release funds?

A: No.

Q: Do you have any authority to sign off on a commitment?

A: Again, the same sort of circumstances, but generally, no.

Q: Okay. So, two folks pass away, you'd have that * * *

[198] THE COURT: Well, that's sort of a hypothetical.

MR. SEKHAR: Okay.

THE COURT: Try it again.

MR. SEKHAR: Thank you, your Honor. Madam, can you play the question back, two questions ago, the one where I didn't ask a hypothetical.

(Record read back.)

BY MR. SEKHAR:

Q: Okay. I'd like to repeat that question. Can you just answer that question again, please? Do you have any—at the time, did you have any authority to release a commitment?

A: No.

Q: And it's true that you rarely, rarely ever got involved in this process, correct, directly involved, not as far as supervisory role, but directly involved, correct?

A: It was rare, but actually had occurred previously.

Q: One time, correct?

A: This was the second time, yes, that's correct.

Q: So once every two years you might get involved, correct?

A: If I had information from the Attorney General's office, which was the prior situation and this situation, I would get involved.

Q: Mr. Bierman, I don't want to cut you off, but

* * *

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THE COURT: But you can't ask the question about whether or not this piece of paper or can you cash it in because—

MR. SEKHAR: Okay. I won't ask that. I'll ask a different question.

THE COURT: Okay.

MR. SEKHAR: Thank you.

(In open court:)

BY MR. SEKHAR:

Q: Based on this approved commitment from Mr. DiNapoli, does FA Technology Ventures have any legal right to this money?

A: I don't believe so, no.

Q: Based on this approved commitment from Mr. DiNapoli, can FA Technology Ventures demand the capital stated in this memo?

A: No.

Q: Based on the approved commitment from Mr. DiNapoli, can FA Technology Ventures demand management fees from the pension fund?

A: No.

Q: The commitment is nonbinding, correct?

A: That's correct.

Q: And the commitment can be unilaterally withdrawn by the Comptroller, correct?

[29] A: Yes.

Q: Can you speak for the reporter again your answer to the last question?

A: "Yes?"

Q: Yes. With the commitment, given that FA Technology Ventures had this commitment, would it have been possible for FA Tech Ventures to sell the commitment to a third party?

MS. COOMBE: Objection.

THE COURT: Sustained.

Q: With an approved commitment, can FA Technology Ventures transfer this commitment to a third party?

MS. COOMBE: Objection.

THE COURT: I'll let him answer that.

Q: Can FA Technology Ventures transfer this commitment to another party?

A: No.

Q: Can this approved commitment be exchanged for money?

MS. COOMBE: Objection.

THE COURT: Overruled.

A: No.

Q: With this approved commitment in hand, does FA Technology Ventures—could we litigate this in a court of law?

* * *

[46] * * * private equity, correct?

A: FA Tech would have, as I understand it, a private equity investment and would have been characterized as an asset class in the private equity space.

Q: And so if an investment is not made in FA Technology Ventures, it would be the strategy of the staff to then find another investment to meet that allocation, correct?

MS. COOMBE: Objection, relevance.

THE COURT: Sustained.

MR. SEKHAR: May I approach, your Honor?

THE COURT: Not this time. Ask another question.

MR. SEKHAR: Okay.

BY MR. SEKHAR:

Q: As a result of—let's say the investment would have gone forward with FA Tech Ventures, okay, assuming that it would have gone forward, over your objections—

A: Are you referring to FA Tech III?

Q: FA Tech III, okay. Would the pension fund have suffered any loss as a result?

A: I have no way to know that.

Q: Okay. You would agree that the pension fund is in the business of investing in investment companies, correct?

A: The pension fund is charged to invest its assets in a manner for the exclusive benefit of the members of the * * *

[56] *Bierman - Redirect - Coombe*

THE COURT: Okay, Miss Coombe.

MS. COOMBE: Thank you, your Honor.

REDIRECT-EXAMINATION

BY MS. COOMBE:

Q: Mr. Bierman, I have Defendant's Exhibit 2 up on the screen and I am going to read the paragraph that's right here (indicating). "In addition, the GKM/Newport fund, a captive fund of fund vehicle designed to make venture investments on behalf of CRF has also made a recommendation to allocate capital to FATV. GKM plans to allocate $15 million to the FATV II main fund as part of its fund of fund program."

Is it your understanding that there would be any limitations about where investments were made for that $15 million to the FATV II main fund?

A: No.

Q: I want to talk—ask you a question about FATV III fund, not the FATV II fund.

A: Okay.

Q: Could Common Retirement Fund money be released to FATV III without a commitment from the Comptroller?

A: No.

MS. COOMBE: I have nothing further.

THE COURT: Recross?

MR. SEKHAR: Yes.

* * *

Excerpts from Jury Trial Transcripts
N.D.N.Y. No. 10-CR-573
April 15, 2011

A: Yes, that is true. And if they answered to Luke, then he would be involved, yes.

Q: Now, if the Comptroller himself decided not to do a deal, the firm would be told that, right?

A: The firm has the final say, and yes, we would inform them.

Q: And that's a lot different than asking that you, for instance, restructure your submission, right, if the Comptroller himself decides not to do a deal?

A: We would only submit to the Comptroller when all other issues had been worked out.

Q: And if the Comptroller decided not to do a deal for some reason, that's a significant event in the deal, correct?

A: Yes, it would be.

Q: The deal is over?

A: It's over.

MS. COOMBE: I have no further questions, your Honor.

THE COURT: Mr. Sekhar.

REDIRECT-EXAMINATION

BY MR. SEKHAR:

Q: Mr. Woolworth, you're not familiar with the circumstances specific to FA Technology Ventures after you left?

* * *

A: My assumption was it was very important to the firm.

Q: Right, but my question is: Didn't you talk to Gregory Hulecki about whether it was important to FA Technology Ventures?

A: I did.

Q: Didn't he tell you that it was very important to his firm?

A: I believe he did.

Q: Wasn't it—didn't he talk to you about how important it was, that his firm could actually go under if this didn't go through?

A: He did.

MR. SEKHAR: Objection, that's hearsay.

THE COURT: It's the same conversation.

BY MS. COOMBE:

Q: And isn't it true that the proposed FATV III, the CRF commitment was going to be $35 million and the other commitment was going to be $10 million, that it was only a $45 million fund at the time?

A: We were very early investors, so I don't remember the numbers offhand, but we were a significant part of it.

Q: Basically, CRF was the bulk of the fund?

A: That's right.

Q: The vast majority?

* * *

Excerpts from Jury Trial Transcripts
N.D.N.Y. No. 10-CR-573
April 18, 2011

[13] *Government's Summation*

* * * and then the data is attached, each one has its own number and it's referred to in the chart, but you'll see when you look at this back in the jury room that the first one refers to 36 hours left. And you've recognized that that is the text in one of the e-mails that was sent.

You also look through and you'll see that there are some text from other e-mails. The e-mail that Mr. Bierman testified about, you remember how the defendant got in touch with Mr. Bierman, said, "Hey, I need to report an ethics problem, could you give me a nonoffice e-mail?" And Mr. Bierman wrote back, and then in response to that, the defendant sent another e-mail, "Be on the look out for something around noon tomorrow." Mr. Bierman told you about that. You'll see the text of that e-mail in the summary.

And ladies and gentlemen, in addition to that, that computer had information showing that that computer was used to do internet searches for Mr. Bierman and for his wife. Ladies and gentlemen, there's no mystery here about who did it; the defendant sent the e-mails in this case.

I want to talk for a moment about the e-mails themselves. Ladies and gentlemen, you heard me read them when Mr. Bierman was on the stand. They're awful. You may remember his words, "appalling." The defendant claimed that he could

prove that Mr. Bierman had a tryst, is the word that was used, and if he didn't do what the defendant [14] wanted, then he would reveal the extramarital affair, first to Mr. Bierman's wife, then to his boss, then to the Attorney General and finally to the Times-Union. Ladies and gentlemen, these are terrible, awful, appalling e-mails. And there's no doubt that the defendant was threatening Mr. Bierman's reputation when he sent them.

Ladies and gentlemen, there wasn't just one e-mail, there were six e-mails, and they came one right after another, turning up the pressure on Mr. Bierman. Right after that first e-mail, there was a second one, "36 hours left to right the wrong." A little white later, "24 hours left." Then the draft letter to the Attorney General. And at the end of that e-mail, "12 hours left." And the e-mail just kept coming. And you remember the last one, referring to Tiger Woods. "How could a woman get that upset."

Ladies and gentlemen, the defendant was keeping up the pressure on Mr. Bierman. So why? Why Luke Bierman? Why did the defendant pick Luke Bierman to try to extort? And ladies and gentlemen, that is clear from the evidence that you've heard in this case. Mr. Bierman wrote a memorandum, and you saw it, you heard him talk about it. He wrote a memorandum recommending that the $35 million commitment for the defendant's company not be approved. And you heard him testify that after he made that [15] recommendation, the Comptroller decided not to do the deal, not to make the commitment, and the deal was dead.

You also heard testimony that this deal was really important to the defendant's company. Now, the Common Retirement Fund's decision to invest is always important because, ladies and gentlemen, you may recall there was testimony if you get that commitment, then you can go around and show it to other investors, "Look, I'm with the retirement fund, don't you want to be in, too?" Here, it was much more than that. The $35 million was the vast majority of FATV III and there was even testimony that Mr. Hulecki told people at the Comptroller's office that the very survival of the company was linked to whether the company got this particular investment.

There was also testimony, you remember Special Agent Mounce did the chart figuring out the fees? More than seven and a half million dollars, ladies and gentlemen. Why did the defendant do this? He wanted Mr. Bierman to change his recommendation because that was holding up the process and without that commitment, there was no hope of getting the deal done. He was doing it for his own personal enrichment.

So what did he do? He sent these e-mails, he ordered Mr. Bierman to do what he wanted him to do, he wanted to take control of his decision making and he wanted [16] Mr. Bierman to make a recommendation that would benefit his company and himself.

Ladies and gentlemen, Judge McAvoy is going to instruct you on the law, and to the extent that I say anything about the law, obviously Judge McAvoy's instructions control and not what I say, but I want to talk to you a little bit about the elements of the

offenses that are charged here and I want to start by talking about attempted extortion. Extortion is when someone obtains property from another with his consent by the wrongful use of fear. And I want to talk about each of those concepts for a moment with you. First of all, I want to talk about property.

Property is not limited to cold hard cash or diamond rings or other things we can put out on the table here and see. It also includes intangible property rights, and Judge McAvoy is going to give you some examples of intangible property rights that can be extorted. One of those examples is the right to make business decisions free from outside pressure. Can't put it on the table, ladies and gentlemen, but it still has value.

Another example of an intangible property right that can be extorted is the right to decide who to work with, and also the right to decide who to contract with. You can't see any of those rights, but they're all [17] intangible property rights, they all have value and they can all be extorted.

In this case, the indictment charges that the defendant was attempting to extort Mr. Bierman's recommendation to the Comptroller that he should approve the commitment, the Comptroller's actual approval of the commitment and the commitment itself. Ladies and gentlemen, these are all examples of the kinds of intangible rights that Judge McAvoy will tell you can be extorted. The right to make business decisions free from outside pressure, the right to contract with parties of one's choosing and the right to decide with who to work. In short, the defendant doesn't get to decide to make business

decisions for the Comptroller's office and he doesn't get to decide who they work with. It's their intangible right to make those decisions and those are intangible property rights.

Obtaining. Judge McAvoy will also give you a definition of obtaining and he's going to give you an example as well. An extortionist obtains property when he orders a victim to exercise his rights consistent with the extortionist's wishes such that the extortionist is essentially controlling the exercise of those rights. Ladies and gentlemen, that's exactly what happened here. In those e-mails, the defendant tried to exercise control over the intangible rights that we just talked about, those [18] intangible property rights. He wanted to take control of, for example, Mr. Bierman's recommendation about whether the commitment should be approved. He wanted to take control and he ordered Mr. Bierman to make the recommendation to approve the commitment. Ladies and gentlemen, that's obtaining. And we've already talked about why he wanted to do that. He wanted to do that because he wanted the commitment to go forward and Mr. Bierman's recommendation not to approve the commitment had brought the process to a grinding halt, the deal was dead, FATV III was dead and that was bad for the defendant and his company. He wanted that deal to go through so that, ultimately, he and his company would make money. So that's property and obtaining property, ladies and gentlemen.

I want to mention, too, that this is an attempt crime. That means the Government does not have to prove that the defendant actually exercised control

over Mr. Bierman's decision-making ability or the other intangible property rights that we've talked about. The Government also does not have to prove that the defendant actually made money because it's only an attempt.

The Government also has to prove that the—there was a wrongful use of fear. Fear. Ladies and gentlemen, there's no question that fear was used in those e-mails in this case, right? The defendant threatened to reveal an * * *

[82] *Court's Charge*

* * * the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that showed what was in the defendant's mind.

Extortion is the obtaining of property from another with his consent induced by wrongful use of actual or threatened fear. The term property includes not only money and other physical or tangible things, but also any valuable intangible right considered as a source or element of wealth. Intangible property rights that may be extorted include the right to contract with a party of one's own choosing, the right to make various business decisions free from outside pressure and the right to decide with whom to work.

In an attempted extortion case, the Government must prove that the defendant attempted to obtain property. A person obtains property by depriving another of the property and by exercising control over it, by transferring it to another or by selling it. A person obtains an intangible property right in the same way; that is, by exercising control over another

person's intangible property right by transferring the intangible property right to a third party or by selling the intangible property right to a third party. An example of an extortionist obtaining an intangible property right is where a victim is ordered to exercise his or her rights in accordance with the [83] extortionist's wishes, such as the extortionist is essentially controlling the exercise of those rights.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 1:10-cr-573

UNITED STATES OF AMERICA,

v.

GIRIDHAR C. SEKHAR,

Defendant.

Filed April 18, 2011

VERDICT FORM

PLEASE NOTE- Each Juror will be provided with a Verdict Form. HOWEVER, YOUR VERDICT SHOULD BE REPORTED TO THE JUDGE ON *ONLY ONE* VERDICT FORM WHICH IS SIGNED BY THE JURY FOREPERSON. The remaining Verdict Forms should be returned to the courtroom deputy unsigned.

Each question must be answered unanimously.

1. As for Count One (1) of the Indictment charging attempted extortion, in violation 18 U.S.C. § 1951(a), how do you, the jury find?

   Not Guilty _____

   Guilty (Handwritten: checkmark)

If your answer to this question is "guilty," circle the property or property right(s) which you find the

Defendant attempt to extort (your decision is not limited to one):

the Commitment;

the Comptroller's approval of the Commitment;

the General Counsel's recommendation to approve the Commitment.*

Proceed to next question.

2. As for Count Two (2) of the Indictment charging the interstate transmission of an extortionate threat on 11/18/09 from/through Jersey City, NJ to Albany, NY, in violation of 18 U.S.C. § 875 (d), how do you, the jury

Not Guilty _____

Guilty (Handwritten: checkmark)

If your answer to this question is "guilty," circle the thing of value that Defendant intended to extort (your decision in not limited to one):

(1) from the Comptroller

(a) the Commitment,

(b) approval of the Commitment,

(c) the General Counsel's recommendation to approve the Commitment,

(2) from the General Counsel his recommendation to approve the Commitment

Proceed to next question.

---

* [Handwritten: all circles in this document]

3. As for Count Three (3) of the Indictment charging the interstate transmission of an extortionate threat on 11/18/09 from/through Brookline, MA to Albany, NY, in violation of 18 U.S.C. § 875 (d), how do you, the jury find?

Not Guilty _____

Guilty (Handwritten: checkmark)

If your answer to this question is "guilty," circle the thing of value that Defendant intended to extort (your decision in not limited to one):

(1) from the Comptroller

(a) the Commitment,

(b) approval of the Commitment,

(c) the General Counsel's recommendation to approve the Commitment,

(2) from the General Counsel his recommendation to approve the Commitment

Proceed to next question.

4. As for Count Four (4) of the Indictment charging the interstate transmission of an extortionate threat on 11/19/09 from/through Brookline, MA to Albany, NY, in violation of 18 U.S.C. § 875 (d), how do you, the jury find?

Not Guilty _____

Guilty (Handwritten: checkmark)

If your answer to this question is "guilty," circle the thing of value that Defendant intended to extort (your decision in not limited to one):

(1) from the Comptroller

(a) the Commitment,

(b) approval of the Commitment,

(c) the General Counsel's recommendation to approve the Commitment,

(2) from the General Counsel his recommendation to approve the Commitment

Proceed to next question.

5. As for Count Five (5) of the Indictment charging. the interstate transmission of an extortionate threat on 11/19/09 from/through Jersey City, NJ to Albany, NY, in violation of 18 U.S.C. § 875 (d), how do you, the jury find?

Not Guilty _____

Guilty (Handwritten: checkmark)

If your answer to this question is "guilty," circle the thing of value that Defendant intended to extort (your decision in not limited to one):

(1) from the Comptroller

(a) the Commitment,

(b) approval of the Commitment,

(c) the General Counsel's recommendation to approve the Commitment,

(2) from the General Counsel his recommendation to approve the Commitment

Proceed to next question.

6. As for Count Six (6) of the Indictment charging the interstate transmission of an extortionate threat on 11/23/09 from/through Jersey City, NJ to Albany, NY, in violation of 18 U.S.C. § 875 (d), how do you, the jury find?

Not Guilty _____

Guilty (Handwritten: checkmark)

If your answer to this question is "guilty," circle the thing of value that Defendant intended to extort (your decision in not limited to one):

(1) from the Comptroller

(a) the Commitment,

(b) approval of the Commitment,

(c) the General Counsel's recommendation to approve the Commitment,

(2) from the General Counsel his recommendation to approve the Commitment

Proceed to next question.

7. As for Count Seven (7) of the Indictment charging the interstate transmission of an extortionate threat on 12/1/09 from/though Brookline, MA to Albany, NY, in violation of 18 U.S.C. § 875 (d), how do you, the jury find?

Not Guilty (Handwritten: checkmark)

Guilty _____

If your answer to this question is "guilty," circle the thing of value that Defendant intended to extort (your decision in not limited to one):

(1) from the Comptroller

(a) the Commitment,

(b) approval of the Commitment,

(c) the General Counsel's recommendation to approve the Commitment,

(2) from the General Counsel his recommendation to approve the Commitment

YOUR DELIBERATIONS ARE COMPLETE.

REPORT YOUR VERDICT TO THE MARSHAL. PLEASE REMEMBER TO DATE AND SIGN YOUR VERDICT SHEET. THANK YOU.

Dated: 4/18, 2011

_____

Foreperson

Government Exhibit 19B, *United States v. Sekhar*, No. 10-573 (N.D.N.Y.)

Anticipated Management Fees for FA Technology Ventures from New York State Common Retirement Fund Investments of $15 million in FATV-III Main and $20 million in FATV-III-NY

Year	Amount
One	$875,000
Two	$875,000
Three	$875,000
Four	$875,000
Five	$875,000
Six	$787,500
Seven	$708,750
Eight	$637,875
Nine	$574,088
Ten	$516,679
Total	**$7,599,891**

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
FEB 25 2013
OFFICE OF THE CLERK

No. 12-357

In the
Supreme Court of the United States

GIRIDHAR C. SEKHAR,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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February 25, 2013

QUESTION PRESENTED

In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court held that the extortion provision of the Hobbs Act, 18 U.S.C. § 1951(a), requires "not only the deprivation but also the acquisition of property" from another person. *Id.* at 404. The Court reversed the verdicts against petitioners in that case because petitioners "neither pursued nor received something of value" from the victims "that they could exercise, transfer, or sell," and that to hold otherwise would eliminate the longstanding distinction between the crimes of coercion and extortion. *Id.* at 405 (quotation marks omitted).

Petitioner was indicted for attempted extortion in violation of the Hobbs Act and interstate transmission of extortionate threats in violation of 18 U.S.C. § 875(d). The indictment alleged that petitioner sent several emails to the general counsel of the New York State Comptroller's Office demanding that he reverse an internal, non-binding recommendation against investment in a fund managed by petitioner. The emails threatened to disclose embarrassing personal information about the general counsel if he did not change his stated opinion about the fund. The jury found in a special verdict that the "property" petitioner attempted to extort was the "General Counsel's recommendation." The Second Circuit affirmed.

The question presented is: whether the "recommendation" of an attorney, who is a salaried employee of a governmental agency, in a single instance, is intangible property that can be the subject of an extortion attempt under 18 U.S.C. § 1951(a) (the Hobbs Act) and 18 U.S.C. § 875(d).

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OPINIONS BELOW

The court of appeals' opinion is reported at 683 F.3d 436 and reproduced at Pet. App. 1a-13a. The district court's opinion denying petitioner's motion to dismiss the indictment is unreported and reproduced at Pet. App. 14a-66a. The district court's opinion denying petitioner's motions for a judgment of acquittal and a new trial is unreported and reproduced at Pet. App. 67a-93a.

JURISDICTION

The court of appeals rendered its decision on June 26, 2012. A petition for certiorari was timely filed on September 19, 2012, and granted on January 11, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Hobbs Act, 18 U.S.C. § 1951, and 18 U.S.C. § 875 are reproduced in the appendix to this brief. App. 1a-3a.

STATEMENT OF THE CASE

This case gives meaning to the time-honored admonition not to "make a federal case out of it." At most, it involves an effort to interfere with the internal deliberative process of a state government, and would seem to be the quintessential incident giving rise to a prosecution under state law or not at all. It arises from several anonymous emails sent to a state government attorney threatening to reveal an alleged affair if the attorney did not reverse an internal, non-binding recommendation he had made to his colleagues. The emails were traced to

petitioner's computer, and at first the case against petitioner proceeded as expected with New York state authorities initiating a state-law prosecution. They initially charged petitioner with attempted extortion before abandoning that claim and charging petitioner with the lesser state-law crime of attempted coercion, which involves the use or threat of force to restrict another's freedom of action, but does not require the extortion of property. State criminal proceedings progressed uneventfully until the state received an unfavorable pretrial ruling, which prompted its attorneys to seek out federal prosecutors. The state proceedings were then abandoned, over petitioner's objection, in favor of a federal prosecution.

Federal prosecutors charged petitioner with attempting to violate the Hobbs Act through extortion, which, unlike the New York crime of coercion, is a property crime and requires the perpetrator to obtain property. Indeed, when Congress adopted the Hobbs Act it looked to New York law as a model and made a considered decision to incorporate the property crime of extortion, but not the lesser crime of coercion. During petitioner's federal trial, the prosecution struggled to identify the "property" petitioner had attempted to obtain. The jury convicted petitioner and stated in a special verdict that the "property" petitioner attempted to "obtain" was the attorney's "recommendation." In affirming petitioner's conviction, however, the Second Circuit recast the "property" at issue as the attorney's intangible "right to make a recommendation" free from threats and held that petitioner attempted to "obtain" this ethereal

"property" by attempting to "exercise" the intangible right for the government attorney.

A. Statutory Background

Enacted in 1946, the Hobbs Act subjects to criminal liability "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a). The Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2). Violations of the Act are punishable by up to twenty years' imprisonment. *Id.* § 1951(a).

Congress used two sources of law as models in formulating the Hobbs Act: the Penal Code of New York of 1909 and the Field Code, a nineteenth-century model penal code for New York. *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 (2003) (*Scheidler II*).[1] Both sources of law, and the pre-1946 New York decisions construing them, drew a distinction between the crime of extortion and the crime of coercion. *Id.* at 405-06. Extortion, like larceny, robbery, and embezzlement, was a property crime and involved "'the obtaining of property from

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[1] *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), is the second in a series of three decisions by this Court arising from the same litigation. Both the district court and the court of appeals referred to the case as "*Scheidler II*." For consistency, this brief does the same.

another, with his consent, induced by a wrongful use of force or fear, or under color of official right.'" *Id.* at 403. The lesser crime of coercion, by contrast, was not a property crime; it involved "the use of force or threat of force to restrict another's freedom of action" or "dictate and restrict the actions and decisions of businesses." *Id.* at 405-06. In enacting the Hobbs Act, Congress expressly chose "to include extortion" as prohibited behavior and to "omit coercion." *Id.* at 406.

The Hobbs Act replaced an earlier federal statute, the Anti-Racketeering Act, which explicitly prohibited both coercion (section 2(a)) and extortion (section 2(b)), both as defined under New York law. *Id.* at 406-07. The Hobbs Act retained the prohibition on extortion without material change. *See* 18 U.S.C. § 1951(b)(2). Section 2(a), however, previously covering coercion, was replaced with a provision prohibiting "robbery," *see id.* § 1951(b)(1), and all traces of the predicate crime of "coercion" were eliminated. 537 U.S. at 406-07. The removal of coercion from the Hobbs Act was not an oversight. It was the result of robust lobbying by representatives of organized labor, who were concerned that "coercion" arguably encompassed labor efforts to force management to alter its conduct or face the threat of consequences (economic or otherwise). *See Evans v. United States*, 504 U.S. 255, 262-63 (1992); *United States v. Enmons*, 410 U.S. 396, 402-06 & n.16 (1973); *see also Hearings on H.R. 5218, H.R. 6752, H.R. 6872, and H.R. 7067 Before the Subcommittee No. 3 of the House Committee on the Judiciary*, 77th Cong., 2d Sess. 126, 154, 158, 227, 233-34 (1942).

Section 875(d) of Title 18 subjects to criminal liability "[w]hoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee." The definition of "extortion" under this provision parallels the definition of "extortion" in the Hobbs Act. *E.g.*, *United States v. Jackson*, 180 F.3d 55, 70 (2d Cir. 1999).

B. Factual Background

The Common Retirement Fund ("Fund") is the employee pension fund for the State of New York and certain local governments in the state. Pet. App. 2a. The State Comptroller is the sole trustee of the Fund and approves and makes all Fund investments. *Id.* If the Comptroller approves an investment of Fund moneys, he issues what is known as a "commitment." *Id.* A commitment signals that the Fund backs a particular investment; it is used, for example, to attract other investors to that investment. *Id.* Importantly, however, a commitment does not bind the Fund to make the investment; that involves additional steps and requires the parties to find co-investors, agree upon business terms, and execute and close on a limited partnership agreement. *Id.* Accordingly, the comptroller's office can issue a commitment even when it ultimately declines to make an investment. Indeed, it did precisely that with a prior fund managed by petitioner's employer. *Id.*

In October 2009, the comptroller's office was considering an investment in two funds managed by

FA Technology Ventures ("FA Technology") and known collectively as "FA Tech III." Pet. App. 2a. At the time, no business terms had been agreed upon between the comptroller's office and FA Technology. J.A. 122. On October 26, the comptroller office's general counsel, Luke Bierman, circulated a three-paragraph internal memorandum recommending against investing in the FA Tech III fund. The memorandum was unusual; the general counsel did not weigh in on commitments in the ordinary course. J.A. 125. Nonetheless, there were a number of ongoing investigations of public officials in Albany, and Bierman wrote that he had learned that the New York Attorney General's Office was investigating a former public official involved in an earlier FA Technology fund, and thus recommended that it would be "prudent" to "avoid moving forward" with respect to FA Tech III. J.A. 54-55, 125. On November 13, the Comptroller decided not to issue a commitment for FA Tech III, and the office so informed a managing partner of FA Technology, Gregory Hulecki. Pet. App. 3a; J.A. 118.[2] Hulecki had previously gotten word of both Bierman's negative recommendation and rumors that Bierman was having an extramarital affair. Pet. App. 3a.

On November 17, Bierman received an anonymous email at his work account requesting a personal email address for the sender to report a "serious ethical issue" concerning the comptroller's office. Pet. App. 4a. Bierman provided a personal email address. *Id.* The next day, at that address,

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[2] The decision below erroneously refers to "George" Hulecki.

Bierman received an anonymous email from the same sender accusing Bierman of having "blackballed a recommendation on a fund" for "political reasons," which the sender characterized as "unethical" and "corrupt[]." *Id.*; J.A. 59. The sender also accused Bierman of having an affair with a co-worker. Pet. App. 4a.

The sender then made the following demand of Bierman:

> Here is what i want you do:
>
> 1) Go to TD, MLM, RE, GK, [redacted] et al. and tell them you've had a few days to think things over and have had a change of heart. You now recommend moving forward with this fund and accepting the decision of the investment staff
>
> 2) You will make a reason such as you reviewed the files and realize that this fund is very important to the In State investing program because they are so active in upstate new york and have created so many jobs. You now believe that to not do this fund would cause terrible disaster to the In State investing program, and that there is a great political liability to TD to do so.
>
> 3) You will reverse your terrible statements on my friend and say positive things

J.A. 60-61 [*sic*]; Pet. App. 4a. The email stated that if Bierman did not comply by November 20, the sender would disclose information about Bierman's alleged

affair to a number of individuals, including his wife, co-workers, and the media. J.A. 61; Pet. App. 4a.

Over the next several days, Bierman received five more emails from the same anonymous source inquiring about the status of the recommendation. Pet. App. 4a; J.A. 63-66, 70-73. Bierman contacted the inspector general for the comptroller's office, and on the advice of law enforcement officials, Bierman responded to the emails by asking for further time. Pet. App. 4a; J.A. 67-69, 109.

The FBI traced some of the emails to a computer located in petitioner's Brookline, Massachusetts home. Petitioner was a managing partner of FA Technology. Other emails were traced to FA Technology offices in Boston. Pet. App. 4a-5a. On December 3, 2009, members of the Brookline Police Department and investigators with the Albany County District Attorney's office executed a search warrant at petitioner's Brookline residence. *Id.* at 48a.[3]

C. State Court Proceedings

On December 4, 2009, state authorities filed a felony complaint in the Albany County City Court charging petitioner with attempted grand larceny in the first degree by extortion. Pet. App. 28a; N.Y. Penal Law §§ 110, 155.05(2)(e), 155.42. The complaint alleged that petitioner attempted "to steal a $25 million investment from" the comptroller's

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[3] Contrary to language suggesting otherwise in the decision below, *see* Pet. App. 4a-5a, the FBI did not execute the search warrant. This matter began as a state law enforcement matter.

office "by compelling or inducing the victim, Luke Bierman ... to deliver said investment to FA Technology Ventures by means of emailing threats to Mr. Bierman." J.A. 75. The complaint referred repeatedly to the emails Bierman received as "extortionist emails" or "emails containing the extortionist threats." J.A. 75.

On February 2, 2010, a grand jury in Albany County returned a two-count indictment against petitioner. Pet. App. 28a. The indictment abandoned the attempted grand larceny by extortion charge and instead charged petitioner with the lesser charge of attempted coercion in the first degree. *Id.*; N.Y. Penal Law §§ 135.60, 135.65. Unlike the state-law grand larceny by extortion charge, the coercion charge is not a property crime and thus did not require proof of an actual or attempted taking of property. The indictment alleged that petitioner "attempt[ed] to compel or induce" Bierman "to engage in conduct in which" Bierman "had a legal right to abstain from." J.A. 77-78. Specifically, it alleged that petitioner "attempted to compel or induce" Bierman "to withdraw his opposition to a proposed investment of the Office of the State Comptroller" by means of "emailing threats" to Bierman. J.A. 78. Unlike the complaint for attempted larceny, the indictment did not refer to "extortionist emails" or "extortionist threats," nor did it allege that petitioner attempted to "steal a $25 million investment." The first-degree nature of the coercion count was due to the aggravating element that petitioner allegedly sought to compel Bierman "to violate his duty as a public servant." J.A. 78; *see* N.Y. Penal Law § 135.65(2)(c).

The indictment also charged petitioner with third-degree bribery. Pet. App. 28a; N.Y. Penal Law § 200.00. Specifically, the indictment alleged the rather novel theory that petitioner had offered the "benefit of withholding the exposure of" Bierman's alleged affair in order to influence Bierman's "vote, opinion, judgment, action, or exercise of discretion as public servant." J.A. 80.

Petitioner moved in state court to dismiss the indictment, for a suppression hearing relating to the fruits of the December 3, 2009 search, and, under *Brady v. Maryland*, 373 U.S. 83 (1963), for the state to disclose all material relating to the Comptroller's decision not to invest in FA Tech III. The *Brady* demand flowed from petitioner's contention that Bierman's recommendation was prompted by considerations relating to the Comptroller's bid for re-election, rather than legitimate concerns with the investment. The request related to the state's burden of demonstrating interference with Bierman's "duty as a public servant." J.A. 90-91. Over the state's objections, on June 30, 2010, in an omnibus order, the state court dismissed the bribery count, granted a suppression hearing, and ordered the state to turn over all materials relating to the decision not to issue the commitment. J.A. 81-91; Pet. App. 28a.

The unfavorable trial court decision dampened the state prosecutors' enthusiasm for the state-law case and prompted them to approach federal prosecutors about adopting the case. As an assistant district attorney later attested, the state sought to lateral the matter to federal prosecutors "[i]n response to the dismissal of half the indictment."

J.A. 93. On July 14, 2010, federal prosecutors met with representatives of the district attorney's office to discuss the case. Pet. App. 28a. Petitioner's state-court suppression hearing was scheduled for August 6, but federal prosecutors "ask[ed] that the state suppression hearing be adjourned to allow the federal prosecution to take over." *Id.* at 37a. The August 6 hearing was adjourned but eventually commenced over a series of dates. *Id.* at 33a. It never concluded.

Instead, on October 22, 2010, before the trial judge could render a decision on the motion to suppress, the United States Attorney filed a complaint charging petitioner with one count of interstate transmission of an extortionate threat, in violation of 18 U.S.C. § 875(d). Pet. App. 35a. That same day, the State of New York moved to dismiss the coercion charge against petitioner. *Id.* at 34a. The trial court eventually granted that motion, over petitioner's objection, on October 27. *Id.* at 35a.

D. District Court Proceedings

Petitioner was subsequently indicted in the United States District Court for the Northern District of New York. Pet. App. 5a. Count one of the indictment was entitled "Extortion" and alleged a violation of the Hobbs Act. J.A. 98, 100. It asserted that petitioner "attempt[ed] to affect commerce by extortion, that is by attempting to obtain property from another with his consent induced by wrongful use of fear and threatened fear." Pet. App. 16a; J.A. 100. The "property" that petitioner allegedly "attempt[ed] to obtain" was identified as "the Commitment, the Comptroller's approval of the Commitment, and the General Counsel's

recommendation to approve the Commitment." Pet. App. 16a; J.A. 100. Counts two through seven of the indictment, alleging violations of 18 U.S.C. § 875(d), asserted that petitioner transmitted emails to Bierman "with the intent to extort (1) from the Comptroller (a) the Commitment, (b) approval of the Commitment, and (c) the General Counsel's recommendation to approve the Commitment, and (2) from the General Counsel his recommendation to approve the Commitment." Pet. App. 16a-17a; J.A. 100-101.

Petitioner, who appeared *pro se* in the pre-trial proceedings and throughout trial, Pet. App. 68a n.10, moved to dismiss the indictment as facially insufficient, arguing that it did not allege that petitioner attempted to deprive or obtain property from Bierman that was a source or element of wealth that could be sold, transferred, or exercised, as required by *Scheidler II*. The district court denied the motion, *id.* at 18a-26a, and the case proceeded to trial.

At trial, the government focused on petitioner's alleged attempt to force Bierman to alter his course of conduct. During its opening statement, the prosecution repeatedly told the jury that "what [petitioner] wanted the General Counsel to do is to reverse his recommendation." J.A. 102-103; *see also* J.A. 103 ("[petitioner] wanted Mr. Bierman to reverse his recommendation"); J.A. 104 (emails "repeatedly asked [Bierman] ... to reverse his recommendation"). Bierman himself testified that he understood the import of the first email to be that he "should alter the recommendation [he] made" in his October 26

memorandum. J.A. 108. He likewise viewed the subsequent emails as designed to make him "reverse [his] recommendation," "alter [his] opinion," "change [his] mind," or "change [his] opinion." J.A. 110, 111, 113, 114, 117. At no point did Bierman testify that he understood the emails to demand that he relinquish money or any other property to any third party.

Bierman testified that as general counsel, he had no authority to approve a commitment on behalf of the Fund or to release any funds; only the Comptroller could approve a commitment or subsequent investment. J.A. 123-124. He added that it was "rare" that the general counsel would involve himself in the internal deliberative process regarding a particular commitment, as he did in expressing his opinion about FA Tech III; indeed, he had done so only once before. J.A. 125. He confirmed that a commitment is non-binding, is non-transferable, cannot be exchanged for money, and does not entitle the investment manager to any capital or management fees. J.A. 126-127. Bierman was unable to say whether the Fund would have suffered a loss had the Comptroller invested in FA Tech III. J.A. 128. And no evidence was introduced as to whether Bierman or the Fund would have suffered a loss had Bierman changed his internal, non-binding recommendation in light of the emails. In its closing, the prosecution again argued that petitioner "wanted Mr. Bierman to change his recommendation." J.A. 136.

Over petitioner's objection, the district court instructed the jury that for purposes of extortion under the Hobbs Act:

> [t]he term property includes not only money and other physical or tangible things, but also any valuable intangible right considered as a source or element of wealth. Intangible property rights that may be extorted include the right to contract with a party of one's choosing, the right to make various business decisions free from outside pressure, and the right to decide with whom to work.

Pet. App. 75a n.13; J.A. 139.

The jury convicted petitioner on the Hobbs Act count and five of the six counts under 18 U.S.C. § 875(d). Pet. App. 5a. For the Hobbs Act count, the jury indicated on a special verdict form that the property that petitioner attempted to extort was Bierman's "recommendation to approve the Commitment." For each count under 18 U.S.C. § 875(d), the jury likewise indicated that the petitioner intended to extort Bierman's "recommendation to approve the Commitment." In all counts, the jury expressly declined to find that the property extorted was "the Commitment" or "the Comptroller's approval of the Commitment." Pet. App. 5a-6a; J.A. 141-146.

Petitioner moved for a judgment of acquittal or a new trial, contending that Bierman's "recommendation to approve the Commitment" was not "property" for purposes of extortion under the Hobbs Act. Pet. App. 6a, 73a. The district court

denied the motion. *Id.* at 67a-93a. At sentencing, the presentence investigation report submitted by the U.S. probation office applied the guideline covering federal extortion, which permits an increase in an offense level based on the "amount obtained or demanded." U.S. Sentencing Guidelines Manual § 2B3.3(b). It declined to increase petitioner's offense level under this provision, however, because it found that "there was no quantifiable value to" petitioner's "demand" that Bierman "rescind his prior recommendation not to approve the commitment and thereafter recommend the approval of the commitment." Presentence Investigation Report 8, 14, *United States v. Sekhar*, No. 10-CF-573 (N.D.N.Y. filed Sept. 20, 2011) (Dkt. 100). The government sought a sentence of at least twelve years in prison. *See* Government's Sentencing Mem. 4, *United States v. Sekhar*, No. 10-CF-573 (N.D.N.Y. filed Sept. 28, 2011) (Dkt. 103). The district court sentenced petitioner to fifteen months' imprisonment, Pet. App. 6a.

E. The Second Circuit's Decision

The Second Circuit affirmed. Rejecting petitioner's contention that Bierman's "recommendation to approve the commitment" was not "property" under the Hobbs Act, the court observed that the "concept of property" under the Hobbs Act "includes, in a broad sense, any valuable right considered as a source or element of wealth." Pet. App. 8a (quoting *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969)) (internal quotation marks omitted). The court then stated that "[t]here is a property right" to "pursue a lawful business," to

"conduct a business free from threats," and to "make various business decisions free from outside pressure." *Id.* (quoting *Tropiano*, 418 F.2d at 1076; *United States v. Arena*, [illegible]0 F.3d 380, 394 (2d Cir. 1999), *abrogated by Scheidler II*, 537 U.S. at 403 n.8; and *United States v. Gotti*, 459 F.3d 296, 327 (2d Cir. 2006)) (internal quotation marks and ellipsis omitted).

The job of general counsel, the court observed, is "to provide legal advice to the Comptroller." Pet. App. 8a. A "'lawyer's stock in trade is the sale of legal services,'" and what is sold is "'time and advice.'" *Id.* (quoting *Massaro v. Chesley (In re San Juan Dupont Plaza Hotel Fire Litig.)*, 111 F.3d 220, 237 n.19 (1st Cir. 1997), and *United States v. Bertoli*, 994 F.2d 1002, 1023 (3d Cir. 1993)). Therefore, the court of appeals held, Bierman had "a property right in rendering sound legal advice to the Comptroller and, specifically, to recommend—free from threats—whether the Comptroller should issue a Commitment." *Id.* at 8a-9a. The court rejected petitioner's argument that this purported "property right" was not a "source or element of wealth" to Bierman, stating that the property right "need not be a source of wealth to the target of the extortion." *Id.* at 9a (emphasis omitted). Regardless, the court believed that Bierman's "ability to give legal advice free from threats—and, specifically, to make a recommendation on FA Tech III," could "be seen as a 'source or element of wealth'" to Bierman. *Id.*

The Second Circuit next held that petitioner satisfied *Scheidler II*'s requirement that there be "not only the deprivation but also the acquisition of

property" for extortion under the Hobbs Act. 537 U.S. at 404. In the court's view, petitioner satisfied this condition because he attempted to "deprive the General Counsel of his right to make a recommendation consistent with his legal judgment" and attempted to "exercise that right by forcing the General Counsel to make a recommendation determined by [petitioner]." Pet. App. 12a. The court acknowledged that had Bierman changed his internal, non-binding recommendation, it would not necessarily have resulted in a commitment, and a commitment would not necessarily have resulted in an investment. *Id.* Nevertheless, in the court's view, "'the concept of property does not depend upon a direct benefit being conferred on the person who obtains the property.'" *Id.* (quoting *Gotti*, 459 F.3d at 320 (quoting *Tropiano*, 418 F.2d at 1075-76)) (ellipsis omitted). Rather, it is enough that the defendant "exercise the rights in question in order to profit." *Id.* (quoting *Gotti*, 459 F.3d at 326) (brackets and internal quotation marks omitted). That was the case here, the court concluded, because "[petitioner], in order to profit, attempted to exercise the General Counsel's property right to make recommendations." *Id.* at 13a.[4]

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[4] The court affirmed the convictions under 18 U.S.C. § 875(d) on the same grounds, noting that the definition of "extortion" under the Hobbs Act "also applies to § 875(d)." Pet. App. 7a.

SUMMARY OF ARGUMENT

The internal, non-binding opinion or recommendation of a salaried government attorney is not "property" under the extortion provision of the Hobbs Act, and accordingly petitioner's convictions cannot stand. This Court made clear in *Scheidler II* that "property" within the meaning of the Hobbs Act extortion provision is the kind of valuable, alienable property that can be sold, transferred, exercised, and acquired by the perpetrator. A government lawyer's opinion or recommendation about whether to issue a commitment for a particular investment fund does not remotely meet that test. That recommendation has no intrinsic value. Nor is it even alienable or acquirable in any relevant sense. Even if the government official is convinced to change his recommendation—whether via threats or persuasion—the recommendation has not been transferred to anyone else, much less the perpetrator, and it has not become someone else's opinion or recommendation. Indeed, the opinion has relevance to the government's internal deliberations only because it is the attorney's recommendation.

That is particularly true here in light of the *ad hoc* nature of Bierman's recommendation. His recommendation was not some required certification or check in a standardized government approval process. Even if it were, this Court has suggested that government licenses before they are issued and the process that surrounds their issuance are not "property." But especially in light of the *ad hoc* nature of Bierman's recommendation against issuing a commitment for a particular investment, it would

be nothing short of bizarre to construe a retraction and more favorable opinion as acquirable "property" under the Hobbs Act. Yet that is the theory that the government presented to the jury and the jury embraced. A straightforward application of this Court's precedent suffices to dispose of that theory.

In implicit recognition of the difficulty with viewing Bierman's recommendation concerning whether to issue a commitment as "property," the Second Circuit advanced a different theory. Although the court of appeals used a variety of shifting formulations, it essentially reconceptualized the "property" as Bierman's right to make his recommendation free from threats. It is not clear that the Court even need reach the Second Circuit's effort to salvage the jury verdict, but in all events, the right to make a recommendation free from outside influence is no more "property" under the Hobbs Act than the recommendation itself.

There is no basis in the text, purpose, or history of the Hobbs Act for the proposition that "property" in the Act's extortion provision includes the intangible right to do (or not to do) something, including the "right to make a recommendation" or to act free from threats. That notion cannot be squared with *Scheidler II*'s commonsense interpretation of the word "obtaining" in the Act to mean "taking possession of" something, which requires property to be alienable. And it is thoroughly inconsistent with Congress' deliberate decision in the Hobbs Act to make extortion a federal crime, but not the lesser offense of coercion. The former is a property crime, while the latter prohibits a broader swath of coercive

conduct without requiring a demonstration that the perpetrator obtained property. Against that backdrop, the Second Circuit's decision to expand the Hobbs Act conception of alienable property to include intangible rights to autonomy in decisionmaking is not just a misinterpretation of the Act, but directly contradicts Congress' considered decision not to make coercion a federal crime.

Were there any remaining doubt, both the rule of lenity and the canon against upsetting the traditional federal-state balance in law enforcement both counsel against such an expansive reading. The rule of lenity has particular force in interpreting the Hobbs Act, which is a tool of choice for both federal prosecutors and civil RICO plaintiffs. Canons against upsetting the traditional federal-state balance and over-federalizing crime also apply with particular force here. There is no reason to think state and local prosecutors will be insufficiently vigilant in protecting the integrity of the state's own internal deliberative process. Moreover, this is not a context where Congress failed to consider the overlap of federal and state criminal law. Congress well understood that the states generally and New York in particular prohibited both extortion and coercion, and Congress specifically chose to federalize the former and leave the latter to state and local prosecutors. By treating a vast array of conduct that at most constitutes the state-law crime of coercion as Hobbs Act extortion, the decision below not only disregards Congress' judgment but calls into question incidents of social protest and labor activism, which may be characterized as coercive but have never been understood as constituting extortion.

ARGUMENT

I. This Court's Precedents Establish That The Internal, Non-Binding Opinion Or Recommendation Of A Salaried Government Attorney Is Not "Property" Under The Extortion Provision Of The Hobbs Act.

In convicting petitioner of violating the Hobbs Act and 18 U.S.C. § 875(d), the jury found that the "property" petitioner attempted to extort was Bierman's "recommendation to approve the Commitment." But under this Court's decisions sensibly construing the Hobbs Act and other federal criminal statutes, that internal recommendation about government action does not constitute "property" and cannot remotely support petitioner's convictions. Accordingly, petitioner's convictions must be reversed.

A. This Court Has Consistently Adopted a Narrow View of "Property" That Can Be the Subject of Federal Criminal Liability.

The Hobbs Act subjects to criminal liability "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a). The Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2). This reference to "property" is not

incidental; as this Court has recognized, extortion is a classic property crime. *Scheidler II*, 537 U.S. at 403. And this entire prosecution turns on whether an internal government recommendation regarding a commitment constitutes property. The parties agree that the definition of extortion under the Hobbs Act also applies to the 18 U.S.C. § 875(d) counts. *See* Pet. App. 7a; Brief for the United States in Opposition at 5, *Sekhar v. United States* (No. 12-357).[5]

This is far from the first time this Court has confronted an aggressive government conception of what constitutes property in a federal criminal statute. Most pertinently, the Court narrowly and sensibly construed the Hobbs Act in *Scheidler II*. There, the Court rejected as an "unwarranted expansion" of the Hobbs Act an argument premised on the proposition that "property" includes "the right to control the use and disposition of an asset." 537 U.S. at 401-02. The Court looked to the Penal Code of New York and the Field Code—two models Congress used in formulating the Hobbs Act—and its own decisions to determine that extortion under the Hobbs Act requires "both a deprivation and acquisition of property." *Id.* at 403-04. To "obtain" property, the Court further remarked, means to "gain possession of" it. *Id.* at 403 n.8. The Court then held that petitioners, a group of anti-abortion protestors, did not violate the Hobbs Act because their conduct

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[5] For brevity, therefore, this brief will henceforth only refer to the impropriety of petitioner's Hobbs Act conviction, though the same reasoning applies to invalidate petitioner's convictions under 18 U.S.C. § 875(d).

did not amount to an "'obtaining of property from'" respondents, a group of health clinics. *Id.* at 403. Petitioners "did not obtain respondents' property," the Court concluded, because while they interfered with respondent's business they "neither pursued nor received something of value from respondents that they could exercise, transfer, or sell." *Id.* at 405 (internal quotation marks omitted).

The Court noted that a contrary result would "eliminate the recognized distinction between extortion and the separate crime of coercion." *Id.* While the crime of coercion involves the use or threat of force to "restrict another's freedom of action" or "restrict the actions and decisions of businesses," it differs from extortion in that it does not require the acquisition of property. *Id.* at 405-06. Preserving that distinction was of particular relevance because, as the Court noted, Congress modeled the Hobbs Act on New York law and made a deliberate decision to incorporate the New York crime of extortion, but to drop the separate New York prohibition on coercion that had been included in a prior federal statute, the Anti-Racketeering Act. *Id.* at 406-07. As such, the Court concluded, "there has been and continues to be a recognized difference between these two crimes," and "this distinction was not lost on Congress in formulating the Hobbs Act." *Id.* at 408. If this distinction were to be abandoned, "such a significant expansion of the law's coverage must come from Congress, and not from the courts." *Id.* at 409.

Likewise, in *Cleveland v. United States*, 531 U.S. 12 (2000), the Court unanimously rejected the government's efforts to broadly construe the term

"property" in the federal mail fraud statute. Specifically, the Court found the definition of "property" in that federal criminal statute was not elastic enough to encompass a state's intangible "right to control the issuance, renewal, and revocation" of state licenses. *Id.* at 23. The mail fraud statute prohibits "obtaining money or property" by means of "false or fraudulent pretenses, representations, or promises" using the mails. 18 U.S.C. § 1341. Petitioner in *Cleveland* had been convicted of violating the statute after making misrepresentations in an application for a video poker license issued by the State of Louisiana. The Court unanimously reversed the conviction, determining that petitioner had not "obtained" anything because "such a license is not 'property'" in the State's hands. 531 U.S. at 20. In so holding, the Court rejected the government's contention that the state's "intangible rights of allocation, exclusion, and control" constitute "property" for purposes of the mail fraud statute. *Id.* at 23.

Cleveland built upon the Court's earlier decision reining in the government's broad conception of "property" under the mail fraud statute, *McNally v. United States*, 483 U.S. 350 (1987). There, the Court rejected the theory that "property" in the mail fraud statute extended to the "intangible rights to honest and impartial government." *Id.* at 355. Although Congress subsequently amended the statute to try to restore prosecutions for so-called honest services fraud, the federal government in *Cleveland* relied on the general reference to "property," and this Court made clear that it did not extend to a state government license in the hands of the state

government. Most recently, of course, this Court rejected the government's broad reading of the amended statute's reference to honest services fraud in *Skilling v. United States*, 130 S. Ct. 2896 (2010). There, the Court observed that *McNally* "stopped the development of the intangible-rights doctrine in its track." *Id.* at 2927. It then narrowly construed the amendment to reach only kickbacks and bribery, *id.* at 2931, with some members of the Court deeming the "intangible right" so hopelessly vague as to violate the Due Process Clause of the Fifth Amendment, *see id.* at 2935 (Scalia, J., concurring in part and concurring in the judgment).

B. The Internal, Non-Binding Recommendation of a Salaried Government Attorney Is Not "Property" Under This Court's Precedents.

The foregoing precedents make plain that Bierman's internal, non-binding "recommendation to approve the Commitment" to FA Tech III does not constitute "property" for purposes of extortion under the Hobbs Act. That internal government recommendation does not have the critical character of transferrable property identified as necessary in *Scheidler II*. And that internal recommendation is less concrete and valuable than the license at issue in *Cleveland*. Thus, since the jury clearly rested its verdict on the view that this internal government recommendation was "property," petitioner's convictions cannot stand. Indeed, because Bierman's internal recommendation is not "property" under the Hobbs Act, the indictment against petitioner was

facially insufficient and petitioner should have never gone to trial.

Bierman's recommendation plainly does not possess the critical attributes of Hobbs Act "property" identified in *Scheidler II*. While the Court there deemed it unnecessary to address the "outer boundaries" of "property" under the Hobbs Act, such as whether obtaining "something as intangible as another's right to exercise exclusive control over the use of a party's business assets" would violate the Hobbs Act, 537 U.S. at 402, it indicated that, at a minimum, "property" for purposes of the Hobbs Act must be "something of value" that the perpetrator must be able to "exercise, transfer, or sell"; it must be capable of being deprived from the victim; and it must be capable of being acquired by the perpetrator. *Id.* at 405.

Bierman's internal, non-binding recommendation or opinion about whether to invest in a particular fund flunks every dimension of that test. It has no value in any relevant sense; it cannot be sold, transferred, or exercised; Bierman cannot be "deprived" of it; and petitioner could not "acquire" it. A positive recommendation from Bierman would have no intrinsic value. While such a favorable recommendation might influence a deliberative process that in turn could lead to a commitment that in turn could lead to an investment, the recommendation is just a part of the deliberative process. It is not the kind of valuable, concrete, and transferrable property this Court required in *Scheidler II*. If the favorable recommendation had been reduced to writing and left on a train or stolen

from a desk drawer, there might be a concern about a breach of the internal deliberative process, but there would be no secondary market for the recommendation; a third party could not transfer the recommendation to itself by replacing the phrase "FA Tech III" with its own name or fund. Bierman could simply reduce his recommendation to writing again, and the loss of the earlier version would have no impact. And if Bierman later modified his recommendation, the existence of the earlier writing would not matter.

Indeed, in the sense relevant for *Scheidler II* the recommendation is inalienable. The recommendation mattered because it came from the general counsel, and not someone else—it was Bierman's opinion or recommendation about how to proceed. Decisionmakers in the comptroller general's office already knew that FA Technology executives like petitioner recommended making a commitment for the FA Tech III fund; what mattered is whether the general counsel injected a concern based on a pending investigation. This point is nicely captured in the state-law coercion indictment, which alleged that Bierman was pressured to "withdraw his opposition." J.A. 78. If the pressure had had its intended effect, Bierman might have dropped his opposition, but that opposition would not be transferred to anyone else.

A recommendation or opinion about a proposed course of conduct, like Bierman's in this case, cannot be "deprived" from anyone or "acquired" by anyone else in anything but the most metaphysical sense. Yet this Court has warned in other contexts that

where "language is straightforward," courts have "no business getting metaphysical." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998). That admonition surely applies with even greater force in discerning the reach of a federal criminal statute. And that is especially so when the federal criminal statute concerns extortion. Extortion is a species of larceny. *See* N.Y. Penal Law § 155.05(2)(e) (referring to extortion as "larceny by extortion"). Larceny involves the deprivation of property from the victim and the appropriation of the same property by the perpetrator, either to himself or to a third person. The property of the victim moves from the victim's possession into the possession of another, unchanged in its nature, character, or identity. A recommendation or opinion simply does not possess these essential characteristics of alienability.

That Bierman's "recommendation to approve the Commitment" is not property under *Scheidler II* is underscored by its *ad hoc* nature. Bierman's opinion was not a required internal certification or check; indeed, it was not a standard part of the ordinary "commitment" process at all, and it came well before the parties had agreed upon business terms or taken other such concrete steps toward finalizing an investment. Bierman admitted that his involvement in the investment process was "rare," and he specified that it had occurred only once before. Thus Bierman's recommendation against issuing a commitment for FA Tech III was itself a deviation from the ordinary course. Although Bierman's precise motivation for issuing that unusual negative recommendation had some relevance to the state

prosecution, what matters here is simply that Bierman's recommendation was an *ad hoc* contribution to an internal deliberative process.

Having raised an *ad hoc* objection to a particular "commitment," Bierman was essentially being pressured to change his opinion or change his mind. In fact, that is precisely what Bierman described to the jury. Each time Bierman was asked to describe what he believed the sender wanted him to do, he gave substantially the same answer: he was to "alter [his] recommendation," "alter [his] opinion," "change [his] mind," or "change [his] opinion." But if there is one thing that is not alienable property, even in a metaphysical sense, it is someone's opinion. Even if a person is convinced to change his or her mind or opinion—whether by threats of force or persuasion—the persuader does not thereby acquire the opinion, mind, or recommendation.

Indeed, even in the context of more formal internal processes, this Court has declined to view aspects of that internal process as "property." Like the pre-issuance video poker license and the process that surrounded it in *Cleveland*, an internal government recommendation as to the best course of action is not property in any normal sense of the word. Although there is surely a legitimate government interest in protecting the integrity of the government's internal deliberations, an outsider cannot "obtain" a state's intangible "right to control the issuance, renewal, and revocation" of licenses or a citizen's "intangible rights to honest and impartial government." *Cleveland*, 531 U.S. at 23; *McNally*, 483 U.S. at 355. Indeed, Congress had to amend the

mail fraud statute precisely because the integrity of the government's internal processes is not "property" in any normal sense of the word, let alone the kind of property that can be transferred, deprived or acquired.

None of this is to suggest that using threats to overbear a person's will and to force a government official to change a stated opinion cannot be criminalized. It can, but the crime is coercion and does not involve the acquisition of property. The government's case to the jury may well have constituted the state-law crime of coercion as described by this Court in *Scheidler II*, but it did not involve the acquisition of property. The alleged conduct was an effort to "restrict [Bierman's] freedom of action," not to acquire his property. 537 U.S. at 405. As *Scheidler II* makes clear, however, the Hobbs Act does not prohibit coercion. Congress had the chance to extend the Hobbs Act to coercion and made a deliberate decision not to do so. *See id.* at 408-09.

That the conduct here describes the classic state-law crime of coercion was not lost on the state prosecutors. Although state prosecutors initially charged petitioner with attempting to extort "a $25 million investment," they quickly thought better of it and settled on seeking an indictment for the lesser crime of attempted coercion. State law even accommodated the notion that attempting to coerce a state official is of particular concern to the state by treating coercion as aggravated if it involved the discharge of public duties. Thus, this case was initially addressed by the proper authorities (state

not federal) under the proper legal rubric (coercion, not the property crime of extortion). Only after that state prosecution started to go sideways, with a series of procedural decisions adverse to the state—dismissing half the indictment, setting a suppression hearing, and ordering disclosure of internal comptroller's office documents—did state prosecutors purposefully seek out their federal counterparts.

But the federal criminal code lacks a coercion provision, and so the federal prosecutors tried to fit this classic coercion case into the Hobbs Act. That effort runs afoul of a virtual wall of this Court's precedent. The case actually presented to the jury focused on Bierman's recommendation or opinion about FA III Tech as the relevant property. But that is clearly not the kind of acquirable property required by this Court in *Scheidler II*. Indeed, the problems with the recommendation or opinion as property were so apparent that it prompted the Second Circuit to reconceptualize the property as Bierman's right to make a recommendation free from coercion. It is not clear the Court even needs to reach that alternative theory, because it is not the one embraced by the jury. But in all events, as shown next, the government's theory fares no better if the property is the right to make a recommendation rather than the recommendation itself.

II. The Second Circuit's Decision Improperly Expanded "Property" Under The Hobbs Act To Include Intangible Rights To Autonomy.

As demonstrated, this Court's cases make clear that an attempt to coerce Bierman's "recommendation to approve the Commitment," J.A. 141-142, does not constitute the extortion of "property" under the Hobbs Act. The Second Circuit nevertheless affirmed petitioner's convictions by improperly transforming the "property" at issue from Bierman's "recommendation" into Bierman's intangible rights to take certain actions. Tellingly, the Second Circuit could not consistently identify the intangible rights that petitioner allegedly extorted; it variously described them as Bierman's "right in rendering sound legal advice to the Comptroller and, specifically, to recommend—free from threats—whether the Comptroller should issue a Commitment," Bierman's "right to make a recommendation consistent with his legal judgment," and Bierman's "right to make recommendations." Pet. App. 8a-9a, 12a, 13a. But however formulated, the Second Circuit's attempt to recharacterize the "property" at issue from what the jury based its verdict on—*i.e.*, the recommendation—to a set of intangible rights to autonomy cannot sustain petitioner's convictions. The text, purpose, and history of the Hobbs Act, as well as this Court's precedents, make clear that these intangible rights do not constitute "property" under the extortion provision of the Hobbs Act. To hold otherwise would eradicate the coercion/extortion distinction recognized in *Scheidler II*, ignore the rule of lenity, and violate core principles of federalism.

A. The Text, Purpose, and History of the Hobbs Act Make Clear that the Intangible Right to Make a Recommendation is Not "Property" For Purposes of the Act's Extortion Provision.

As reflected in this Court's decisions, there is no basis in the text, purpose, or history of the Hobbs Act for the Second Circuit's belief that "property" under the Act's extortion provision encompasses intangible rights to autonomy like the right to make a recommendation "free from threats" or "consistent with [one's] legal judgment."

1. The Second Circuit's far-ranging "concept of property," Pet. App. 8a, is not supported by the text of the Hobbs Act. *See Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) ("We begin, as always, with the text of the statute."). To the contrary, the statutory text demonstrates in at least three ways that "property" under the Act is significantly more circumscribed than the Second Circuit's broad conception that would extend to intangible rights to autonomy.

First, the extortion provision of the Hobbs Act covers the "*obtaining* of property *from another*." 18 U.S.C. § 1951(b)(2) (emphases added). As this Court recognized in *Scheidler II*, that language demonstrates that the "property" in question must be capable of being transferred or assigned. An intangible right like the "right to make a recommendation" may be disturbed, interfered with, or impaired entirely, but as *Scheidler II* holds, such conduct does not satisfy the "obtaining" requirement

of the Hobbs Act. Instead, there must be "the acquisition of property." 537 U.S. at 404; *see also* Model Penal Code § 223.3, Comment 2, pp. 182 (defining "obtaining" under extortion as "bringing about a transfer or purported transfer of a legal interest" (brackets omitted)), *cited in Scheidler II*, 537 U.S. at 408 n.13.

Notably, in *Scheidler II*, the Court declined to accept a broader conception of "obtaining" that might conceivably encompass the intangible rights identified in the decision below. The lone *Scheidler II* dissenter, Justice Stevens, endorsed the reasoning of *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), which construed "obtaining" as "the regulation of the fate ... of something." 537 U.S. at 416 (Stevens, J., dissenting) (internal quotation marks omitted). But the Court rejected what it described as a "vague and obscure" definition in favor of "the familiar meaning of the word 'obtain'—to gain possession of." *Scheidler II*, 537 U.S. at 403 n.8. While it might be possible to fit this case into the dissent's broader conception of obtaining property, there is just no way that an intangible right like the right to make a recommendation can be obtained in "the familiar meaning of the word" insisted upon by the Court in *Scheidler II*.

Second, the main provision of the Hobbs Act punishes not only acts of extortion and robbery, but also actual or threatened "physical violence to any person or property." 18 U.S.C. § 1951(a). As used in that provision, "property" plainly refers to something more concrete than the intangible "right to make a recommendation." Such an intangible right to

autonomy can be interfered with, but it cannot be physically defiled. It is a "basic canon of statutory construction," however, "that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992); *see also Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Accordingly, the term "property" as used elsewhere in the statute, including the extortion provision in 18 U.S.C. § 1951(b)(2), should be limited to more concrete property interests that, like a person, can be the subject of physical violence.

Third, while the Second Circuit repeatedly invoked the broader notion of a "property right," *see, e.g.*, Pet. App. 7a-8a (stating that Hobbs Act requires the "deprivation of a property right from another"); *id.* at 8a (recognizing general counsel's "property right in rendering sound legal advice"); *id.* at 13a (recognizing general counsel's "property right to make recommendations"), the Hobbs Act refers only to "property," not "property rights." The Second Circuit clearly added the word "right" in an atextual effort to broaden the statutory phrase. And while "property rights" may extend to more intangible rights, "property" is much more naturally read to refer to property in its customary, more concrete sense.

When Congress has wanted to reach beyond "property" to protect against the broader interest in conducting a business or exercising autonomy, it has done so expressly. *See, e.g.*, 18 U.S.C. § 1964(c) (standing to assert RICO claim requires injury to "business or property"); 18 U.S.C. § 2333(a) (standing under terrorism law requires injury to "person,

property, or business"); *see also* 20 U.S.C. § 4302 (vesting university with "property and the rights of property"). It did not do so in the Hobbs Act, however, notwithstanding that a "'paramount congressional concern'" in drafting the Act "was to be clear" about what was and was not covered by the law. *Scheidler II*, 537 U.S. at 407 (quoting *United States v. Culbert*, 435 U.S. 371, 373 (1978)) (internal quotation marks omitted). Indeed, as *Scheidler II* notes, the Hobbs Act was praised by its contemporaries for its "precision." *Id.* at 407 n.12. Thus Congress' decision to use the word "property"—and not "property right," "property interest," or other broader terminology—as that which must be "obtain[ed]" indicates its intent to give the term a far narrower meaning than the Second Circuit embraced.

2. The history and purpose of the Hobbs Act further demonstrate that, in enacting the law, Congress did not intend for "property" to include intangible rights like the "right to make a recommendation" or for the extortion provision to extend criminal liability to the coercion of the exercise of such rights. Congress well understood the difference between extortion and coercion and intentionally omitted the latter from the Hobbs Act.

As *Scheidler II* explains, in 1934, Congress enacted the Anti-Racketeering Act, which explicitly prohibited both coercion (section 2(a)) and extortion (section 2(b)), both as defined under New York law. 537 U.S. at 406-07. Congress then revisited the subject after this Court's decision in *United States v. Teamsters*, 315 U.S. 521 (1942), and passed the

Hobbs Act "to supersede the Anti-Racketeering Act." 537 U.S. at 407. Section 2(b) of the Hobbs Act, covering extortion, remained substantially the same as in the predecessor act. *See* 18 U.S.C. § 1951(b)(2). Section 2(a), however, was replaced with a provision prohibiting "robbery," *see id.* § 1951(b)(1), and Congress eliminated all traces of the predicate crime of "coercion."

There was nothing inadvertent about the elimination of a coercion prohibition and its replacement with robbery, which like extortion is a classic property crime. Representatives of organized labor had expressed concern that the crime of coercion arguably encompassed labor efforts to force management to alter its conduct or face the threat of consequences (economic or otherwise) and had lobbied hard to ensure that coercion was excluded from the Hobbs Act. *See* p. 4, *supra*.

Scheidler II further explains that in drafting both the Anti-Racketeering Act and the Hobbs Act Congress looked to two sources of New York law—the Penal Code of New York and the Field Code. 537 U.S. at 403. Under both, the crime of coercion involved "the use of force or threat of force to restrict another's freedom of action." *Id.* at 405. Furthermore, New York case law applying the state coercion statute before the enactment of the Anti-Racketeering Act and the Hobbs Act "involved the prosecution of individuals who ... employed threats and acts of force and violence to dictate and restrict the actions and decisions of businesses." *Id.* at 405-06 (citing *People v. Ginsberg*, 188 N.E. 62 (N.Y. 1933), *People v. Scotti*, 195 N.E. 162 (N.Y. 1934), and

People v. Kaplan, 269 N.Y.S. 161 (1934)). In *Ginsberg*, for example, the defendant threatened and engaged in property violence in order to compel a store owner to become a member of a local trade association and to remove certain price advertisements from his store window. 188 N.E. at 62. In *Scotti*, the defendants used threats and force to compel the victim to enter into an agreement with a labor union of which the defendants were members. 195 N.E. at 162. And in *Kaplan*, the defendants, high-ranking members of a labor union, threatened and employed violence to force other members of the same union to drop lawsuits challenging the union's leadership. 269 N.Y.S. at 162, 165.

The crime of extortion, by contrast, was under both the New York Penal Code and the Field Code a property crime. *See Scheidler II*, 537 U.S. at 403 (noting that extortion, along with larceny, robbery, and embezzlement, were the four classic property crimes). Indeed, New York law continues to refer to extortion as larceny by extortion. *See* N.Y. Penal Law § 155.05(2)(e). It was not enough under New York's pre-Hobbs Act caselaw to interfere with someone's autonomy or decisionmaking through threats; extortion required an effort to obtain property. *See, e.g.*, *People v. Learman*, 28 N.Y.S.2d 360 (App. Div. 1941) (reversing extortion conviction based on threat to revoke driver's license because such license is a "right," not "property," and noting that "[t]he fact that an operator's license is not transferable or assignable shows that it is not property"); *cf. People v. Ashworth*, 222 N.Y.S. 24, 28 (App. Div. 1927) (noting that while "the right to

produce oil is personal property ... it would impossible to steal such property").

The same was true under the Field Code, which defines extortion in language almost identical to the Hobbs Act: "'the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.'" *Scheidler II*, 537 U.S. at 403. The Field Code directly tied the conception of property for extortion to its conception of property for larceny, which also involved "'the criminal acquisition of ... property.'" *Id.* Section 584 of the Field Code, covering larceny, cites twenty-two English, New York, and other American cases, all of which indicate that "property" to the drafters of the Field Code meant money, tangible things of value, or notes, bills, or other written documents evidencing money or other tangible property—and not intangible rights to engage or not engage in certain conduct. *See, e.g.*, *Reg. v. White*, 6 Cox. 213 (1853) (gas diverted from pipe); *Reg. v. Smith*, 7 Cox. 93 (1855) (certificates of shares in company entitling holder to dividends); *Ward v. People*, 6 Hill 144 (N.Y. 1843) (ice when put away for domestic use); *see also People v. Loomis*, 4 Den. 380 (N.Y. Sup. Ct. 1847) (no larceny involving receipt for repayment of worthless debt); *Payne v. People*, 6 Johns. 103 (N.Y. Sup. Ct. 1810) (no larceny involving letter containing information but no intrinsic value).

Thus, as a legal matter, extorting someone's free will or their ability to make a recommendation is simply not possible. It ignores the fundamental dichotomy between extortion and coercion: "Extortion protects property; coercion protects

autonomy." G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability Under RICO*, 33 Am. Crim. L. Rev. 1345, 1657 (1996).

Accordingly, extending the Hobbs Act to intangible rights to autonomy like the "right to make a recommendation" is not just tinkering on the margins of a federal criminal statute. It would be antithetical to Congress' considered judgment to prohibit extortion, but not the lesser crime of coercion. The difference between using threats to obtain another's alienable property and otherwise attempting to "restrict the actions and decisions" of others was critical to Congress. *Scheidler II*, 537 U.S. at 406. While both courses of conduct raise concerns—that is why New York law criminalizes both—Congress consciously decided to criminalize only the former. That is why the Second Circuit's gradual process of expanding Hobbs Act extortion from alienable property to more and more intangible rights to autonomy is so problematic. While the impulse might be understandable (again, New York law is not indifferent to coercion, and the Anti-Racketeering Act reached both), it is fundamentally inconsistent with Congress' judgment. To expand the term "property" in the extortion provision to cover intangible rights such as the right to make a recommendation is not just to misconstrue the statute, but to re-write it in a way that Congress clearly did not intend. *Cf. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993).

B. The Rule of Lenity and Core Federalism Principles Confirm that the Intangible Right to Make a Recommendation is Not "Property" Under the Hobbs Act.

The foregoing discussion firmly establishes that under the best and most straightforward reading of "property" in the extortion provision of the Hobbs Act, the term does not extend to intangible rights like the "right to make a recommendation" or, more generally, the right to take or not take certain action. But to the extent there is any ambiguity about the meaning of "property" under the Hobbs Act, well-established canons of construction support a narrow construction of the term "property." Indeed, both the rule of lenity and the canon against upsetting the federal-state balance in law enforcement strongly reinforce a construction of "property" that does not extend to looser concepts of property rights or interests in autonomy in making a recommendation.

1. The rule of lenity requires that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Cleveland*, 531 U.S. at 25 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Thus in *Cleveland*, the Court invoked the rule in holding that a state's "intangible rights of allocation, exclusion, and control" over issuance of video poker licenses do not constitute "property" under the federal mail fraud statute, 18 U.S.C. § 1341. 531 U.S. at 23; *see also Skilling*, 130 S. Ct. at 2932-33 (applying rule of lenity in narrowly construing "honest services" provision of federal mail and wire fraud statutes); *Jones v. United States*, 529

U.S. 848, 858 (2000) (applying rule of lenity in narrowly construing federal arson statute).

The Court's invocation of the rule of lenity in *Cleveland* is especially apposite here. Not only do both cases involve the term "property," but both cases involve efforts to interfere with a state government's internal process leading to a decision of some potential value. But in both cases, the relevant focus was not on the license or commitment but the state government's "intangible rights" of "control" over the decisionmaking process. During closing argument in petitioner's trial, the prosecution accused petitioner of "obtaining" Bierman's right to "control" his own decisionmaking and recommendations. J.A. 138. If the "intangible right of ... control" over issuance of licenses does not constitute "property" for purposes of the federal mail fraud statute, it is difficult to discern how Bierman's "control" over his decisionmaking and recommendations constitutes "property" under the federal extortion statute.

Moreover, the Court has repeatedly invoked the rule of lenity in the specific context of the Hobbs Act. In *Scheidler II*, the Court observed that "'[w]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'" 537 U.S. at 409 (quoting *McNally*, 483 U.S. at 359-60); *see also Cleveland*, 531 U.S. at 25; *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). Given this Court's precedents and the text, purpose, and history of the Hobbs Act, the Second Circuit's expansive reading of "property" to reach intangible rights to autonomy

that are the exclusive province of the law of coercion should not even count as a "rational reading." But even treating it as such, Congress has not spoken in such "clear and definite language" regarding the meaning of "property"—which the Act does not explicitly define—so as to foreclose application of the rule of lenity. As such, the Second Circuit's "harsher" reading of the extortion provision should be rejected. *See also Enmons*, 410 U.S. at 411 (applying rule of lenity to "strictly construe[]" Hobbs Act).

Application of the rule of lenity is "especially appropriate" here because violation of the Hobbs Act "is a predicate offense under RICO," *i.e.*, the Racketeer Influenced and Corrupt Organizations Act. *Cleveland*, 531 U.S. at 25; *see* 18 U.S.C. § 1961(1). As Justice Ginsburg observed in her *Scheidler II* concurrence, RICO, which "imposes severe criminal penalties and hefty civil liability on those engaged in conduct within the Act's compass," has "already evolved into something quite different from the original conception of its enactors," warranting "concerns over the consequences of an unbridled reading of the statute." 537 U.S. at 411-12 (Ginsburg, J., concurring) (brackets and internal quotation marks omitted). As in *Scheidler II*, the Court should again be "rightly reluctant" to endorse an "expansive definition of 'extortion,'" a common RICO predicate, that would simultaneously broaden the sweep of both RICO and the Hobbs Act. *Id.* at 412.

Relatedly, the Second Circuit's interpretation of "property" in the extortion provision of the Hobbs Act triggers vagueness concerns that further counsel

against the court's holding. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling*, 130 S. Ct. at 2927-28 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Untethering the term "property" from transferrable property and construing it to encompass autonomy interests in being able to act "free from threats" raises serious vagueness concerns.

The shape-shifting nature of the "property" petitioner allegedly attempted to "obtain" in this case is ample proof of the potential for mischief. The jury found that the "property" at issue was Bierman's "recommendation to approve the Commitment." Recognizing the weakness in construing that internal recommendation as "property," the Second Circuit changed course and viewed the relevant "property" as Bierman's "right to make recommendations." Pet. App. 13a. And even then, the Second Circuit could not definitively settle on what precise "property" petitioner attempted to extort, defining it variously as Bierman's "right in rendering sound legal advice," his right "to recommend—free from threats—whether the Comptroller should issue a Commitment," and his "right to make a recommendation consistent with his legal judgment." *Id.* at 8a-9a, 12a. If a court of appeals cannot clearly and consistently state what "property" has been extorted—and each of its varying formulations differs from the "property" the jury found to have been extorted—then "ordinary people" cannot "understand what conduct is prohibited," and

a person's liberty should not depend on the shadowy boundaries of the term. *Skilling*, 130 S. Ct. at 2927-28 (internal quotation marks omitted). The vagueness of the Second Circuit's expansive conception of property is yet an additional reason that interpretation should be rejected. *See id.* at 2928-30 (noting that vague statutes are to be construed narrowly to eliminate constitutionally suspect interpretations); *McNally*, 483 U.S. at 360 (refusing to construe federal mail fraud statute "in a manner that leaves its outer boundaries ambiguous").

2. Fundamental principles of federalism also point in the same direction. This Court has rightfully been reluctant to "federalize much ordinary criminal behavior ... that typically is the subject of state, not federal, prosecution." *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 20 (2006) (*Scheidler III*). Efforts to interfere with a state's internal deliberative process are not to be treated lightly, but they are a quintessential matter for state, and not federal, prosecution. And it ill-serves the federal-state balance for federal prosecutors to step in when they perceive state prosecutors are being insufficiently vigilant in vindicating state law or, as here, only after a state prosecution begins to go sideways.

This is not a context like situations in which the state political officers are themselves accused of corruption, where there are structural concerns that state and local prosecutors may "underenforce" state criminal laws designed to protect the integrity of the state's own deliberative process. Whatever concerns

there may be with the willingness of state and local prosecutors to take on powerful but corrupt state and local officials, those prosecutors have every incentive to protect the integrity of their own deliberative processes from outside interference.

This is a case in point. Petitioner allegedly sent several emails to a state government official threatening to reveal embarrassing personal information if the individual did not reverse an internal recommendation. In response, the state of New York swiftly investigated the matter, dispatched agents to Massachusetts, and brought criminal charges against petitioner under a state statute that not only squarely covered the purported conduct but treated the potential interference with a public official's duties as an aggravating factor. Thus, not only does a state government have every incentive to investigate and prosecute crimes that target the integrity of the state's own deliberative processes; that is precisely what happened here.

There are only two situations in which federal prosecutors would have any occasion to get involved in circumstances like those at issue here or in *Cleveland*. Either federal prosecutors would have a different conception of how to exercise prosecutorial discretion over a matter that principally and directly implicates the integrity of state government, or as here, the federal prosecutors would be called in after the early rounds of state-court litigation did not proceed as state prosecutors had hoped. Neither situation is particularly conducive to maintenance of the proper and traditional balance between state and federal power and law enforcement.

Such concerns are directly relevant in reviewing the Second Circuit's expansive conception of property under the Hobbs Act. "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States v. Bass*, 404 U.S. 336, 349 (1971). As a result, this Court "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* Instead, the Court applies a presumption that "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Jones*, 529 U.S. at 858 (quoting *Bass*, 404 U.S. at 349); *see also Cleveland*, 531 U.S. at 24 (rejecting government's interpretation of 18 U.S.C. § 1341 because "it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress"); *Jones*, 529 U.S. at 860 (Stevens, J., concurring) ("[W]e should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain.").

As *Scheidler II* and the discussion above make clear, Congress expressly declined to include the state-law crime of coercion when enacting the Hobbs Act. And Congress looked not just to state law in the abstract, but to New York law in particular and declined to follow New York's lead when it came to criminalizing coercion. That is why the Second Circuit's incremental expansion of "property" to include intangible rights of autonomy is so antithetical to Congress' intent and to the federal-

state balance. That expansion not only disregards Congress' conscious decision to criminalize the property crime of extortion, but not the lesser crime of coercion; it also simultaneously expands federal criminal law into a realm of no special federal concern that was already covered by state law. Indeed, one will look far and wide for a better example of the overexpansion of federal law. Petitioner was prosecuted under state law for the precise criminal infraction—the New York prohibition on coercion—that Congress declined to make part of the Hobbs Act.[6]

Concerns with over-federalization of crime and upsetting the traditional federal-state balance are particularly acute here for two different reasons. First, that this case involved a Hobbs Act extortion count is no accident. Like the mail fraud statute at issue in *Cleveland*, Hobbs Act extortion is one of the favorite tools for federal prosecutors, having been described as the "darling of the federal prosecutor's nursery." James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 U.C.L.A. L. Rev. 815, 905 (1988); *cf. Evans v. United States*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) (noting that "the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws"). Thus,

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[6] It bears reiterating, moreover, that long before federal prosecutors charged petitioner with extortion under the New York-modeled Hobbs Act, the state of New York had abandoned its own extortion charge against petitioner.

maintaining a limited and easily administrable scope for the Hobbs Act is unusually important.

Second, and equally significant, the Second Circuit's expansion from concrete property to broader efforts to distort the will of another is no small step. Under the court's reasoning, there is almost no species of coercive conduct that cannot be converted into the federal crime of extortion under the Hobbs Act—by recasting the "property" as the victim's right to do (or not do) something. Thus, threats designed to get a parking-meter attendant not to write a ticket or to rip one up would constitute extortion, as would any effort to coerce the issuance of video poker licenses. Outside the government sector, a threat to write a bad review of a restaurant if the owner fails to provide a desirable table would constitute extortion of the owner's right to assign tables at will. And certainly any effort to interfere with an employer's right to determine which workers to hire and how much to pay them could be characterized as extortion. *See* pp. 51-52, *infra*. Put simply, if the "property" at issue is simply the right to act free of coercion—*e.g.*, the right to make a recommendation free from threats—and a coercive act results in the "obtaining" of that "property," then every act of coercion constitutes federal extortion. *Cf.* Transcript of Oral Argument at 47, *Scheidler II*, 537 U.S. 393 (2003) (Nos. 01-1118, 01-1119) (unidentified Justice remarking to counsel for respondents that "if whenever you deprive somebody ... of a right, you say you obtain control of the right ... that you've deprived

them of," then "everything becomes an obtaining of property").[7]

But this Court need not rely on hypotheticals to confirm the indefensibility of the Second Circuit's reasoning; it can look to its own case law. Under the Second Circuit's approach, the conduct of the abortion protestors in *Scheidler II* would have constituted extortion because the health clinics possessed the right to conduct their businesses as they desired, and the protestors "obtained" that "property" when they sought to alter the behavior of the clinics through acts or threats of violence. Likewise, in *Enmons*, the violent conduct of a labor union, carried out during a lawful strike for higher wages, would have constituted extortion because an employer possesses the right to conduct its business as it wishes (including not providing higher wages). By seeking to modify the employer's conduct, the union "obtained" the employer's "property." But, of course, in both of these cases the Court held that the conduct did *not* amount to extortion under the Hobbs Act. *See Scheidler II*, 537 U.S. at 409; *Enmons*, 410 U.S. at 411-12. Indeed, in *Enmons*, the Court observed that neither the language nor the history of the Hobbs Act justified the conclusion that Congress intended "such an unprecedented incursion into the

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[7] These far-reaching and undesirable consequences are only compounded by the Second Circuit's belief that, as a matter of law, the "property" that an extortionist obtains "need not be a source of wealth" to the victim, Pet. App. 9a—a proposition itself in serious tension with *Scheidler II*. *See* 537 U.S. at 405 (no extortion where petitioners failed to obtain "something of value" from respondents (internal quotation marks omitted)).

criminal jurisdiction of the States." 410 U.S. at 411. But that is precisely what follows from the Second Circuit's erroneous reasoning; conduct falling under the purview of a state coercion statute like New York's—a statute that provides for a maximum sentence of one year in prison, *see* N.Y. Penal Law §§ 70.15(1), 135.60—can easily be transformed into federal extortion, a crime punishable by up to *twenty* years' imprisonment, *see* 18 U.S.C. § 1951(a).[8]

3. As *Scheidler II* and *Enmons* also indicate, affirming the Second Circuit's decision would expose social protestors and labor unions alike to the threat of federal criminal liability under the Hobbs Act. Throughout American history, both groups have

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[8] The disparity in punishment is even greater in this case because petitioner was charged with attempted crimes, which New York sentencing law treats more leniently. Attempted second-degree coercion in New York is a class B misdemeanor with a maximum sentence of three months. N.Y. Penal Law §§ 70.15(2), 110.05(8), 135.60. Because petitioner allegedly attempted to induce Bierman to "violate his duty as a public servant," petitioner was charged with attempted first-degree coercion, which is a class E felony with a maximum sentence of four years. N.Y. Penal Law §§ 70.00(2)(d), 110.05(6), 135.65(2)(c). Both durations, of course, are well below the maximum sentence of twenty years for attempted or completed Hobbs Act violations. And, notably, the government urged a sentence for petitioner of at least twelve years—far more than the maximum sentence petitioner could have received under New York law. *See* p. 15, *supra*; *cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) ("The fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years illustrates how a criminal law like this may effectively displace a policy choice made by the State." (citations omitted)).

engaged in a range of conduct designed to compel or induce another party, through violence or fear (including fear of economic loss), to alter conduct in which the party has a right to engage or not engage. Prohibitionists like Carry Nation destroyed kegs of beer to force saloons to stop selling alcohol; anti-segregationists conducted sit-ins at lunch counters to force restaurateurs to serve African-Americans; environmentalists have chained themselves to trees to force logging companies to suspend activities. Labor unions routinely employ work stoppages, picket lines, and other tactics to force an employer to provide better wages or other benefits.

In each of these situations, the protestor or union member, through violence, inducement of fear, or other illegal activity (such as trespass), seeks to compel another party to engage in behavior it has a legal right not to engage in. Under the Second Circuit's reasoning, the protestor or union member has "obtained" the other party's "property," constituting federal extortion punishable by up to twenty years in prison (as well as a predicate act for RICO). Given the Nation's rich tradition of social protest and labor activism, that cannot be the law. Indeed, it would be particularly ironic if a federal criminal statute purposefully stripped of all references to coercion due to organized labor's own vigorous objections, *see* p. 4, *supra*, could in turn be used to bring federal charges against organized labor for garden-variety work actions. But that is the result of the Second Circuit's aberrant reasoning, which does violence to both this Court's precedents and the Nation's history.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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February 25, 2013

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18 U.S.C. § 1951

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any

Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.

18 U.S.C. § 875

Interstate Communications

(a) Whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.

(c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

REPLY BRIEF

RECORD
AND
BRIEFS

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In the
Supreme Court of the United States

GIRIDHAR C. SEKHAR,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The government devotes the vast majority of its brief to refuting an argument no one has made. The government strenuously demonstrates that "property" under the Hobbs Act extends to intangible property, and is not limited to tangible property. Petitioner never suggested otherwise, since "property" clearly includes transferable, obtainable intangible property like patents and options. From the undisputed premise that Hobbs Act property includes *some* intangible property, the government contends that such intangible property must necessarily include all "intangible rights with economic value." That conclusion does not remotely follow. To the contrary, as this Court made clear in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) (*Scheidler II*), the Hobbs Act covers only the kind of alienable property—whether tangible or intangible—that can be obtained or transferred. It does not extend to intangible interests in autonomy or "intangible rights with economic value." While such interests can be the target of coercion, they are not property that can be extorted under the Hobbs Act.

The government cites a multitude of cases, but cannot identify a single one in which this Court has suggested that "intangible rights with economic value" constitute Hobbs Act property. For good reason. That definition is incompatible with the Court's decisions construing the Act and other analogous criminal statutes. Extortion and fraud are fundamentally property crimes, and contorting the definition of "property" to include anything of value,

including the intangible right to exercise one's profession, empowers federal prosecutors at the expense of providing clear notice of the bounds of federal crimes. Thus, consistent with the rule of lenity, a long line of this Court's decisions construe "property" narrowly and reject the notion that something as inchoate as one's right to autonomy in economic affairs constitutes "property."

The government is also thoroughly unable to reconcile its argument with the coercion/extortion distinction this Court emphasized in *Scheidler II*. Congress expressly adopted the New York property crime of extortion and expressly declined to incorporate the lesser New York non-property crime of coercion. Here, petitioner was charged under the precise New York crime that Congress declined to incorporate, but when that state-law prosecution went sideways, the federal prosecutors filed extortion charges in the absence of any obtainable or transferable property. The government ignores this uncomfortable state-court prologue and is equally silent about the federalism implications of its theory. It likewise offers no meaningful response to its theory's coverage of social protestors and labor unions. The government complains instead that reversing petitioner's conviction would undermine efforts to target organized crime. But "mobsters," just like anyone else, can engage in coercion *or* extortion, and only the latter is criminalized by the Hobbs Act. If the government wants to create a new federal crime of "honest services coercion," it must direct its argument to Congress, not this Court.

ARGUMENT

I. The Internal, Non-Binding Opinion Or Recommendation Of A Salaried Government Attorney Is Not "Property" Under The Extortion Provision Of The Hobbs Act.

Despite the government's repeated suggestions to the contrary, petitioner has never disputed that Hobbs Act "property" includes some intangible property—namely, obtainable, transferable intangible property, like patents, options, and confidential business information. But just because Hobbs Act "property" includes *some* intangible property, it by no means follows that the definition must necessarily include all "intangible rights with economic value." Br. 16. Indeed, even the government acknowledges (at 24-25) that "the term 'property' does not encompass all intangible rights." And nothing in this Court's precedents supports the notion that the relevant question is whether an intangible right has "economic value." To the contrary, the Hobbs Act covers only alienable property—whether tangible or intangible—that can be transferred or obtained. The government's novel and amorphous expansion would have far-reaching and dangerous consequences.

A. The Government's Broad Definition of Hobbs Act "Property" Is Inconsistent With the Relevant Precedents.

The government cites a wealth of caselaw and repeatedly invokes its "intangible rights with economic value" definition. *See* Br. 10, 11, 15, 16, 17,

19, 21, 23, 27, 28. But there is no correspondence between the government's caselaw and its favored definition. To the contrary, the government's broad definition finds absolutely no support in either this Court's decisions construing the Hobbs Act and other federal criminal statutes involving "property," or New York decisions predating the Hobbs Act interpreting substantially similar state extortion laws. Those decisions instead establish that Hobbs Act "property" amply covers alienable property—both tangible and intangible—such as money, notes, patents, and confidential business information, but not "intangible rights with economic value" like the "right to make a recommendation."

1. The logical starting place in addressing the meaning of property in the Hobbs Act is *Scheidler II*. Although that decision addressed the meaning of the term "obtain," not "property," its definition of "obtain" and consideration of the Act's origins certainly inform what types of "property" can be "obtained" and thus fall within the Hobbs Act. The Court adopted the "familiar meaning of the word 'obtain'—to gain possession of." 537 U.S. at 403 n.8. The property must be capable of being the object of both "deprivation" and "acquisition." *Id.* at 404. It must be capable of "'a transfer or purported transfer.'" *Id.* at 408 n.13 (citing Model Penal Code § 223.3, Comment 2). All of these characteristics are consistent with a narrow definition of Hobbs Act "property" meaning something that is necessarily transferable, alienable, or assignable—whether tangible (such as money or personal goods) or intangible (such as patents, options, or confidential business information). They are also consistent with

pre-1946 New York caselaw. *See People v. Learman*, 28 N.Y.S.2d 360, 365 (App. Div. 1941) (reversing extortion conviction where object of extortion was "not transferable or assignable" and thus "not property").

These critical characteristics are inconsistent, however, with a broad definition of property that includes "intangible rights with economic value," especially a government attorney's "right to give his disinterested legal opinion," as the government now characterizes the purported "property" here. Opp. 39.[1] Petitioner could not acquire, much less possess, Bierman's ability to provide a legal opinion to the Comptroller about investments; Bierman assuredly could not "transfer" that ability to petitioner. Indeed, Bierman's legal opinions to the Comptroller had potential value only because they were *his* opinions, not someone else's—particularly a non-attorney unaffiliated with the New York state government. Petitioner certainly could not acquire Bierman's

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[1] Throughout this case, the government has consistently re-characterized the "property" petitioner allegedly extorted, from Bierman's "recommendation to approve the Commitment" (in the indictment) to his "right to make a recommendation consistent with his legal judgment" (in the court of appeals) to, now, his "right to give his disinterested legal opinion." *See* Pet'r Br. 43-44. The government's shape-shifting would be unnecessary if there actually were some property at issue. *Cf. Scheidler II*, 537 U.S. at 400-01. Indeed, it is unclear whether the government's constantly evolving conception of the property at issue here even satisfies its own amorphous test.

"right to give [a] *disinterested* legal opinion," since petitioner himself was an interested party.

While *Scheidler II*'s treatment of "obtaining" forecloses the government's broad definition of "property," there was an alternative conception of "obtaining" in that case that could be squared with the government's theory here—namely, the dissent's. Justice Stevens' lone dissent construed "obtaining" to mean "'the regulation of the fate ... of something.'" 537 U.S. at 416 (quoting *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999)). But the majority relied on text, context, and the rule of lenity to reject that broader definition. *Id.* at 403 n.8.

Indeed, it is difficult to square the government's broad definition of Hobbs Act "property" with the outcome of *Scheidler II*. The government alleges that Hobbs Act property includes the "right to run a business or to pursue a job without unlawful outside interference." Br. 28-29. But in *Scheidler II*, petitioners indisputably "achieved their ultimate goal of 'shutting down'" abortion clinics and thus had "completely deprived [the clinics] of their ability to exercise" their property right "of exclusive control of their business assets." 537 U.S. at 404-05. Nonetheless, the Court found no Hobbs Act extortion. *Id.* at 405.

The government attempts to distinguish *Scheidler II* by asserting that in that case, petitioners' "ultimate objective" was merely to "'interfer[e] with or depriv[e]'" the clinics of property, "not to obtain it." Br. 39. Thus, if petitioners in that case had sought to "force the clinics to provide orthopedic services instead of abortion services" or to

"themselves provide abortion-related services to the clinics' patients," the government suggests that the conduct would have constituted extortion. *Id.* at 39-40. That distinction cannot be correct. The interest of the abortion protesters in *Scheidler II* was that the abortion clinics stop providing abortion services, and they would have been perfectly happy if the clinics had shifted to orthopedics.

More broadly, neither an action/inaction distinction nor a motive (profit versus political) analysis explains the Court's decision. Property did not somehow spring into being because the coercion alleged here was directed at causing Bierman to change his opinion (action), rather than at preventing Bierman's initial negative recommendation (inaction). Indeed, if the so-called property at issue is Bierman's "right to give his *disinterested* legal opinion," then the object of the alleged coercion was to prevent Bierman from exercising that right—just as the protestors in *Scheidler II* sought to prevent the clinics from exercising their right to provide abortions and control their business assets. Likewise, if petitioner's motive had been to ensure that the state made socially responsible or "green" investments, that *non-economic* motive would not make a difference.

But the government's larger problem with *Scheidler II* is that decision's extensive discussion of the history of the Hobbs Act and Congress' considered decision to incorporate the New York crime of extortion, but not the New York crime of coercion—even though (or more accurately because) only the former requires property to be obtained.

Scheidler II's extensive discussion of the coercion/extortion distinction is no small embarrassment to this federal prosecution, which began as a New York prosecution under the very coercion statute Congress chose not to incorporate into the Hobbs Act. *See* Pet'r Br. 30-31, 36-40. And the distinction between extortion and coercion is fundamental. A threat that prevents someone from playing ball in the park is coercion; a threat that forces someone to pay money to play ball in the park (or to hand over the ball) is extortion.

The government responds with a *non sequitur*—that coercion addresses "aspects of human relations [that] are not economic in character." Br. 44. But as this Court made clear in *Scheidler II*, the dividing line between coercion and extortion is whether coercion is used to obtain property, not something as ill-defined and amorphous as whether the coercion is directed to "aspects of human relations ... not economic in character." Moreover, coercion was excluded from the Hobbs Act based on the concerns of labor unions, which were decidedly interested in using coercion in connection with the economic aspects of human relations. *See* Pet'r Br. 4.[2]

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[2] The government likewise gains nothing by trying to label (at 34) making disinterested legal opinions Bierman's "'stock in trade.'" In its original meaning that phrase referred to a shopkeeper's literal stock or inventory, *i.e.*, transferable, obtainable goods. *Corn Prods. Ref. Co. v. Comm'r*, 350 U.S. 46, 51-52 (1955). And the only thing more arbitrary than the government's suggested distinction between intangible rights with or without economic value would be a distinction among

Moreover, *Scheidler II* described coercion as the use or threat of force or fear to "restrict another's freedom of action" or "restrict the actions and decisions of businesses." 537 U.S. at 405-06. Manifestly, the Court did not limit coercion to "non-economic" situations. Rather, it cited three prototypical pre-1946 New York business coercion cases that included economic motives. *Id.* The government weakly suggests that the prosecution *could* have charged those defendants with extortion, but chose not to. Br. 45. But the government cites only a post-1946 New York case charging both coercion *and* extortion, and the pre-1946 cases demonstrate that state prosecutors included extortion charges only when there was a basis for doing so—namely, the obtaining of property. *See People v. Cuddihy*, 271 N.Y.S. 2d 450, 450 (Ct. Gen. Sess. 1934) (indictment charging defendant with coercing victim "to do an act which he had a legal right to refrain from doing" *and* extorting $17.50).

More broadly, the government's view highlights the stakes in this case. Under the government's theory, virtually every act of coercion (a misdemeanor under New York law) can be transformed into Hobbs Act extortion (a felony punishable by 20 years' imprisonment). *See* Pet'r Br. 49-50. That is underscored by the government's pernicious construction of the Court's statement in *Scheidler II* that Hobbs Act property can be

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intangible rights with economic value based on their germaneness to the alleged victim's chosen profession.

"acquired" if the perpetrator can "exercise" it. 537 U.S. at 405. Seizing upon that statement, the government repeatedly suggests (at 12-13, 26, 37, 40, 43-45) that "exercising another's right" to do something constitutes the "obtaining of property." But if that were true, then every coercive action can be mutated into the obtaining of property by recharacterizing it as, first, the "obtaining" of someone's right to do something, and second, the simultaneous "exercise" of that right by dictating the act to be done. The government's two-step is limitless and irreconcilable with this Court's precedents. In *Cleveland v. United States*, 531 U.S. 12 (2000), for example, the Court held that a license is not "property" in the state's hands. But under the government's theory here, the state in *Cleveland* had a "property right" to issue licenses based on certain criteria, which the defendant "obtained" when, in submitting false information, he caused the state to issue licenses it would not have otherwise issued, thereby "exercising" the state's property right. As the unanimous *Cleveland* decision demonstrates, the term "property" has meaning, and merely interfering with another's intangible rights, regardless of motive, is not it.[3]

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[3] The government's brazen assertion (at 14) that "[n]o one disputes that petitioner's means ... were extortionate," encapsulates its willful distortion of the issue here. In fact, petitioner strenuously disputes that proposition; because his alleged conduct did not involve property, it was at most coercive, not "extortionate." Tellingly, the government's support for this proposition is an extortion case targeting good, old-fashioned money, not some ill-defined intangible right. *See*

2. The government's broad definition cannot be squared with *Cleveland* or this Court's other decisions construing the term "property" in the federal mail fraud statute, 18 U.S.C. § 1341. The government recognizes that "property" in the Hobbs Act cannot be read to be broader than the same term in the mail fraud statute. Br. 24. It also concedes that "the term 'property' does not encompass all intangible rights." *Id.* at 24-25. The latter concession is far more damaging than the government acknowledges. As an initial matter, it confirms the logical fallacy of the government's main proposition: that because Hobbs Act "property" includes more than tangible goods (which petitioner does not dispute), it must necessarily extend all the way to "intangible rights with economic value."

United States v. Nardello, 393 U.S. 286, 295-96 (1969). In a similar vein, the government repeats the Second Circuit's incorrect assertion that petitioner "admitted to sending the anonymous e-mails." Br. 6. Petitioner did no such thing. The only evidence of petitioner's purported "admission" is testimony by the investigator who initially interviewed petitioner during execution of the search warrant. But during the state proceedings, an accompanying officer testified that the investigator never questioned petitioner about the emails, and the investigator testified that the accompanying officer was present during the entire interview. Only during federal proceedings months later did the investigator modify his testimony and contend that the accompanying officer was not present during the entire interview. *See* Pl.'s Omnibus Motion, Ex. 6, at 61-62, 100, 126-27, 189-90 (N.D.N.Y. Jan. 10, 2011) (Dkt. 13-6); Transcript of 4/11/2011 Proceedings at 97-99 (N.D.N.Y. May 16, 2011) (Dkt. 78).

Even more problematically, the government's concession is forced by *McNally v. United States*, 483 U.S. 350 (1987), where the Court held that the intangible right to honest services is not "property" under the mail fraud statute. *Id.* at 355, 360; *see also Skilling v. United States*, 130 S. Ct. 2896, 2927 (2010); *Cleveland*, 531 U.S. at 18-19. That holding is significant on two levels. First, and most obviously, the supposed property that formed the basis of the prosecutions in *McNally* and *Cleveland* was very similar to the supposed "property" here. In all three cases, the object of the allegedly criminal activity was the interference with the proper functioning of a state or local government. Indeed, this case could loosely be described as a government effort to create the crime of "honest services extortion" (or more accurately, "honest services coercion"). Second, when Congress subsequently amended the statute to cover honest services, *see* 18 U.S.C. § 1346, it did not do so by amending the definition of "property." Rather, it added deprivation of "honest services" as an alternative form of actionable mail fraud, which only underscores that whatever was the object of the alleged coercion here, it was not property.

Tellingly, the government has almost nothing to say about *Cleveland* except to claim that the Court held there that "the State had a regulatory interest in the licenses, not a property interest." Br. 38. But the government argued unsuccessfully in *Cleveland* that the state had a property interest, not just a regulatory interest, because of its "significant control over the issuance, renewal, suspension, and revocation of licenses," which petitioner sought to "frustrate[]." 531 U.S. at 21-23. That argument

fares no better here. If an outsider's attempt to "frustrate" the internal processes of state government, thereby depriving public officials of their intangible "right to control" state functions, is not a deprivation of "property," then neither is an attempt to interfere with the internal processes of the New York state government, thereby depriving the General Counsel of his "right to control" his recommendations.

The government has substantially more to say about *Carpenter v. United States*, 484 U.S. 19 (1987), but that decision does not aid the government. The government argues (at 24-25) that *Carpenter* "specifically rejected" the argument that "property" in the mail fraud statute is limited to tangible goods. Indeed, and petitioner does not contend otherwise. In fact, *Carpenter* helpfully illustrates that intangible property, such as the confidential business information at issue there, can nonetheless be transferable, obtainable, and alienable. But that hardly means that "intangible rights with economic value" constitute property, particularly when *Carpenter* described the notion of a "contractual right to ... honest and faithful service" as "too ethereal" to constitute "property." *Id.* at 25.[4]

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[4] The government cites (at 24-25, 35-36) passing statements in *Carpenter* that a newspaper has a property right in "making exclusive use ... of the schedule and contents of" confidential business information and the right "to decide how to use it prior to disclosing it to the public." 484 U.S. at 26. But those intangible "rights" are what makes confidential business information valuable and confidential; they are not the property

3. The notion that Hobbs Act "property" includes any "intangible right with economic value" is also incompatible with this Court's decisions addressing official extortion. Official extortion involves "the obtaining of property from another ... under color of official right," 18 U.S.C. § 1951(b)(2), and at common law typically occurred when a public official took "*money* that was not due to him for the performance of his official duties." *Evans v. United States*, 504 U.S. 255, 260 (1992) (emphasis added); *see also McCormick v. United States*, 500 U.S. 257, 273 (1991). The "official extortion" provision of the Hobbs Act "continues to mirror the common-law definition," *Evans*, 504 U.S. at 263-64, and while that definition comfortably encompasses transferable intangible property like patents or confidential business information, *cf. Scheidler II*, 537 U.S. at 402 (common-law official extortion included taking "'money or [a] thing of value'"), neither the Act's text nor its history suggests that Congress intended to expand the scope of "property" a public official could extort to "intangible rights with economic value."

Indeed, since "[m]any official actions certainly ... implicate economic interests," acceptance of the government's broad definition would criminalize a vast array of heretofore permissible official conduct. Br. for Alabama et al. at 10, *Scheidler II* (July 12, 2002). Government officials routinely threaten enforcement proceedings or legislative action if

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itself. That is why *Scheidler II* accurately identified the "property" in *Carpenter* as only the "confidential business information," not any incidental rights. 537 U.S. at 402.

businesses continue practices that readily constitute the pursuit of "intangible rights with economic value."

4. The government accurately notes that in interpreting the scope of the Hobbs Act, this Court "has repeatedly looked to New York's pre-1946 'judicial construction of the New York statute[s]'" covering extortion. Br. 20 (quoting *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (brackets omitted)); *see Scheidler II*, 537 U.S. at 403-04, 405-06. Unfortunately for the government, *every* pre-1946 New York extortion case it then cites (at 21-22, 31) involved the obtaining of *money or an alienable good* from the victim; *none* involved the obtaining of an "intangible right to economic value." *See People v. Barondess*, 31 N.E. 240, 240 (N.Y. 1892) ($100); *People v. Hughes*, 32 N.E. 1105, 1105 (N.Y. 1893) ($1,000); *People ex rel. Short v. Warden*, 130 N.Y.S. 698, 699 (App. Div. 1911) (money), *aff'd*, 99 N.E. 1116 (N.Y. 1912); *People v. Sheridan*, 174 N.Y.S. 327, 328 (App. Div. 1919) ($50); *People v. Weinseimer*, 102 N.Y.S. 579, 580 (App. Div. 1907) ($1,000 and seven promissory notes), *aff'd*, 83 N.E. 1129 (N.Y. 1907).

While these decisions provided broad descriptions of the term "property," they did so not in the context of that which must be "obtained" by the perpetrator, which is covered by N.Y. Penal Law § 850 (1909), but in the context of the types of threatened "injur[ies]" to "person or property" that constitute "wrongful use of force or fear" by the perpetrator, which is covered by N.Y. Penal Law § 851 (1909). The narrow construction of "property" in § 850 and broader construction of "property" in

§ 851 is understandable, since the former must be "obtained"—and is thus properly confined to money or other transferable property—while the latter need only be the object of threatened "injury"—and thus may sensibly be construed to cover, for example, interference with one's right to operate a business. *See, e.g.*, *People v. Squillante*, 185 N.Y.S.2d 357, 361 (N.Y. Sup. Ct. 1959) (observing that "the right to contract may be property injured under Section 851 of the Penal Law ... but it is difficult to consider that right property obtained under Section 850").

The government's inability to identify a single pre-1946 New York decision involving—much less upholding—extortion convictions where the property obtained was an "intangible right with economic value," or anything close to it, speaks volumes about the infirmity of utilizing that definition for purposes of Hobbs Act "property." Petitioner, by contrast, has identified pre-1946 New York decisions *reversing* convictions where the "property" obtained was an "intangible right with economic value." *See* Pet'r Br. 38-39 (citing *Learman*, 28 N.Y.S.2d 360, and *People v. Ashworth*, 222 N.Y.S. 24 (App. Div. 1927)). The government offers no response to these decisions. Where a perpetrator "obtained" "intangible rights with economic value," New York courts uniformly considered such conduct coercion, not extortion. *See* Pet'r Br. 37-38; *Scheidler II*, 537 U.S. at 405-06; p. 9, *supra*. Conflating the two, as the government does throughout its brief, was reversible error.

The government likewise cannot cite any cases under the New York Field Code where anything like an "intangible right with economic value" was the

object of a property crime like extortion. Petitioner, by contrast, has identified numerous Field Code cases involving only money or transferable items. *See* Pet'r Br. 39. The government asserts that these cases are inapposite because they appear under the "larceny" provision of the Field Code, which allegedly covered only "personal property." Br. 45 n.9. But as *Scheidler II* explains, the Field Code's extortion provision was almost identical to that in the Hobbs Act, and "included 'the criminal acquisition of ... property,'" not merely "personal property." 537 U.S. at 403 (ellipsis in *Scheidler II*). The Field Code's extortion provision then directed the reader to the note accompanying the larceny provision, where representative cases for *all* provisions involving the "criminal acquisition of property" were listed. Thus the cases described in that note bear directly on a proper understanding of the "property" that had to be "obtained" to constitute extortion under the Field Code and, later, the Hobbs Act.[5]

5. The government relies on dictionary definitions of "property" or this Court's decisions addressing the meaning of that term under the Due

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[5] The government's reliance on post-1969 New York extortion caselaw (at 22) is unavailing since each of those decisions—construing a revised penal code enacted in 1965—obviously "could not have been a case on which Congress relied" in enacting the Hobbs Act in 1946. *Evans v. United States*, 504 U.S. 255, 267 n.18 (1992). The same is true for the government's New York decisions not involving extortion. *See Bianco v. Eisen*, 75 N.Y.S.2d 914 (N.Y. Sup. Ct. 1944); *Canfield v. Moreschi*, 40 N.Y.S.2d 757 (N.Y. Sup. Ct. 1943); *Dusing v. Nuzzo*, 29 N.Y.S.2d 882 (N.Y. Sup. Ct. 1941).

Process Clause of the Constitution or the Clayton Act. Br. 16-19. But as the foregoing precedents establish, "property" under the Hobbs Act (and analogous criminal statutes) is simply not the same as any "right" or "interest" in property. That is especially so when the property must be that which can be "obtained," and not just the object of injury (as in the Clayton Act) or interference (as in due process). Nonetheless, this Court rejected the notion that "the activity of doing business" is "property" protected by due process. *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (emphasis omitted). The government's reliance on Clayton Act cases is particularly inapposite since the statute addresses injury "to property, *or to a property right*." 29 U.S.C. § 52 (emphasis added). The Hobbs Act, by contrast, mentions only "property." *See* Pet'r Br. 35-36. The government dismisses the distinction between property and property rights as "illogical parsing," Br. 36, but the Clayton Act demonstrates that Congress knows the difference.

6. The government argues (at 47) that the rule of lenity is inapplicable because the "competing reasons" for the alternative definitions of Hobbs Act "property" are not in "equipoise." In a sense, this is true: the relevant precedents clearly repudiate the government's wide-ranging definition. But if there were any doubt, the rule of lenity firmly militates against the government's broad construction, as it has in other recent government efforts to interpret "property." While the rule of lenity may be frequently invoked by defendants, it has been frequently applied by this Court when it comes to the

very term at issue here. *See Cleveland*, 531 U.S. at 25; *McNally*, 483 U.S. at 359-60; *see also Skilling*, 130 S. Ct. at 2932-33. The Court has also applied the rule in construing the Hobbs Act, violations of which are RICO predicates. *See Scheidler II*, 537 U.S. at 409; *id.* at 411-12 (Ginsburg, J., concurring); *Enmons*, 410 U.S. at 411; *see also* Br. of NACDL 4-10. None of this is an accident. Mail fraud and Hobbs Act extortion are two of the most frequently utilized arrows in the federal prosecutor's quiver, and the scope of the term "property" is critical to determining whether those statutes are meaningfully cabined property crimes or all-purpose crimes that can be invoked whenever a federal prosecutor identifies unsavory conduct that implicates the intangible interest in honest services or an arguably even more capacious "intangible right with economic value."

B. The Government Cannot Meaningfully Rebut the Far-Reaching and Harmful Consequences of Its Broad Definition of Hobbs Act "Property."

1. The government has no meaningful answer to petitioner's demonstration that affirming his conviction would run roughshod over core federalism principles that this Court has consistently upheld in similar situations. *See* Pet'r Br. 45-51. Remarkably, the government does not *once* acknowledge the substantial state proceedings that occurred in this case before the prosecution went pear-shaped and was lateraled to the federal prosecutors. *See id.* at 8-11. The government's only response is to mischaracterize petitioner's federalism arguments as based solely on a complaint that "the crime he

committed was a state crime" and to cite *United States v. Culbert*, 435 U.S. 371 (1978), and *Stirone v. United States*, 361 U.S. 212 (1960), for the proposition that Congress in enacting the Hobbs Act fully exercised its constitutional power to displace state crimes. Br. 46-47. But as the Court explained in rejecting a substantially similar argument by the *Scheidler II* respondents (based on the same cases the government cites), "there is no contention by petitioner[] here" that Congress lacks the authority to prohibit his alleged conduct. 537 U.S. at 408. Rather, his argument is that his alleged acts do "not amount to the crime of extortion as set forth in the Act." *Id.* at 408-09. And this Court does not lightly infer that Congress intends to upset the traditional federal-state balance.

The government also ignores that this case—like *McNally* and *Cleveland*—involves efforts to interfere with the smooth functioning of state and local government. While Congress may well have the power to criminalize such misconduct, it is hard to imagine a more appropriate subject for state—rather than federal—law enforcement. There is no reason to think state and local prosecutors will have insufficient incentives to prosecute such efforts, and no reason to infer that Congress meant to empower federal prosecutors to override or skew state and local prosecutorial decisionmaking.

2. The government also has no response to the fact that its theory would expose social protestors and labor unions to the threat of Hobbs Act liability. *See* Pet'r Br. 51-52. The government incorrectly suggests that petitioner "liken[s] himself" to social

protestors throughout history. Br. 42. But the problem is not that petitioner has likened himself to anyone; it is that the government's broad theory of property fails to distinguish between petitioner's alleged object and those of countless social protestors, labor unions, or even lobbyists. Whether a prohibitionist destroying kegs of beer to force a barkeep to sell sarsaparilla instead of alcohol, or an African-American sitting at a whites-only counter to force a restaurant to serve minorities, these protestors have one thing in common: no less than the abortion protestors in *Scheidler II*, they are employing "use of actual or threatened force, violence, or fear," 18 U.S.C. § 1951(b)(2), including trespass, vandalism, and fear of economic impact, to compel a business to alter its conduct in a way that complies with the protestors' demands. That is precisely the definition of "obtaining of property" that the government advances; indeed, it is precisely how the government describes petitioner's alleged conduct. Accordingly—and the government never actually denies it—Hobbs Act liability would extend to these and similar protestors under the government's approach.

Relying solely on *Enmons*, the government contends (at 41-42) that its position would not expose labor unions to Hobbs Act liability. But the text of the Hobbs Act reveals no "labor law exception." And the Court in *Enmons* focused solely on the higher *wages* the union sought to win for its members; it did not suggest that the violence, vandalism, or, most pertinently, interference with the business's operations that occurred during the strike amounted to an "obtaining of property." By asserting that

attempts to "exercise" control of business assets constitute an "obtaining of property," however, the government's approach plainly suggests that the Hobbs Act would extend to such scenarios. That would be a remarkable outcome given that Congress expressly removed "coercion" from the Act after lobbying by organized labor. *See* Pet'r Br. 4.

3. Citing a supposedly "uniform[]" line of holdings, the government argues that the courts of appeals have "routinely found criminal extortion" where the "property" at issue was an "intangible right with economic value." Br. 23 & n.5, 29-31, 42-43. Relatedly, the government claims that reversing petitioner's conviction "would frustrate one of the core objectives of the act, *viz.* to fight racketeering." *Id.* at 32-33. These contentions are meritless.

The government's purportedly unbroken line of appellate authority is hardly that. Some are abortion protest cases that do not survive *Scheidler II*. *See Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995); *Ne. Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989). Others have been questioned by post-*Scheidler II* decisions. *See United States v. Zemek*, 634 F.2d 1159 (9th Cir. 1980), *called into doubt by United States v. McFall*, 558 F.3d 951, 957-58 & n.7 (9th Cir. 2009) (reversing extortion conviction notwithstanding *Zemek* and questioning whether, after *Scheidler II*, "an extortionist [could] ever 'obtain'" the "'right to solicit business free from wrongful coercion'"). Still others involved the acquisition of money. *See United States v. Stephens*, 964 F.2d 424 (5th Cir. 1992); *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986). And a number are

mistaken Second Circuit decisions and their progeny. *See United States v. Cain*, 671 F.3d 271 (2d Cir. 2012); *United States v. Coppola*, 671 F.3d 220 (2d Cir. 2012); *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006); *United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1999); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969); *see also United States v. Vigil*, 523 F.3d 1258, 1264 (10th Cir. 2008); *United States v. Thompson*, 647 F.3d 180, 187 (5th Cir. 2011).[6]

This Court has not hesitated to correct an erroneous interpretation of the law even when a circuit has embraced the error repeatedly and other circuits have followed suit. *See, e.g.*, *McNally*, 483 U.S. at 355-56; *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601-02 (2001). Indeed, the fact that an error is oft-repeated in the lower courts is a reason to grant a petition, but not a reason to affirm.

The government's appeal to preserving a purported "core objective[]" of the Hobbs Act fares no better. As the government concedes, Br. 32, the "limited effect" of the Hobbs Act "was to shut off the possibility opened up" by *United States v. Teamsters*, 315 U.S. 521 (1942), which had suggested that unions could "exact *payments* from employers" for

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[6] *Tropiano*, the fount of all later federal decisions, does not withstand scrutiny. Rather than address the Act's text or pre-1946 New York decisions, it principally relied on the same broad reading of *Stirone* that *Scheidler II* rejected and inapposite descriptions of "property" in due process cases. *See* 418 F.2d at 1075-76.

superfluous services. *Enmons*, 410 U.S. at 403 (emphasis added); *id.* at 408 (noting that "Congress was intent on undoing the restrictive impact" of *Teamsters*). Thus the objective of Congress in replacing the Anti-Racketeering Act with the Hobbs Act was to criminalize the obtaining of *money* in circumstances this Court had treated as non-actionable. It was not to criminalize coercion—conduct Congress had included in the prior Anti-Racketeering Act but intentionally excluded from the Hobbs Act.

In all events, there is no "mob exception" to the Hobbs Act. The mob is certainly capable of using both coercion and extortion to achieve its objectives, but only the latter is prohibited by the Hobbs Act. If the government needs an additional substantive crime to target organized crime, it should direct its argument to Congress, not this Court. If Congress is so inclined, it can legislate in a manner that targets specific mob activity without sweeping in conduct, like that alleged here, that is far removed from mob activity and would amount to this Court recognizing a new federal crime of honest services coercion.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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April 15, 2013

AMICUS CURIAE BRIEF

No. 12-357

In the Supreme Court of the United States

GIRIDHAR C. SEKHAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner attempted to obtain property by means of extortion, in violation of 18 U.S.C. 1951(a) and 18 U.S.C. 875(d), by seeking to exercise, through threats, the right of an attorney to make a recommendation to his client pertaining to a pension fund investment from which petitioner sought to profit.

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In the Supreme Court of the United States

No. 12-357

GIRIDHAR C. SEKHAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 683 F.3d 436. The opinions of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 14a-66a) and denying petitioner's motion for a judgment of acquittal (Pet. App. 67a-93a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2012. The petition for a writ of certiorari was filed on September 19, 2012, and was granted on January 11, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of New York, petitioner was

convicted on one count of attempted extortion, in violation of the Hobbs Act, 18 U.S.C. 1951(a), and five counts of interstate transmission of extortionate threats, in violation of 18 U.S.C. 875(d). Pet. App. 1a, 5a. He was sentenced to 15 months of imprisonment. *Id.* at 6a. The court of appeals affirmed. *Id.* at 1a-13a.

1. Petitioner was a managing partner of FA Technology Ventures, a firm that sought investments from New York's Common Retirement Fund (Fund), the employee pension fund for the State of New York and some of its local governments. Pet. App. 2a, 4a-5a. As the sole trustee of the Fund, the State Comptroller has final approval over all of the Fund's investments. *Ibid.* When the Comptroller approves an investment on behalf of the Fund, he issues a "Commitment." *Ibid.* A Commitment is necessary for an investment by the Fund to go forward, but not all Commitments result in an actual investment as the parties must first execute and close on a limited partnership agreement. *Ibid.*

In 2008, the Comptroller's Office issued a Commitment for a $35 million investment in one of FA Technology Ventures' funds. Pet. App. 2a. The investment (known as FA Tech II) never closed. *Id.* at 2a. The following year, in October 2009, the Comptroller's Office considered whether to issue a Commitment for another $35 million investment in FA Technology Ventures. *Id.* at 2a-3a. That investment (known as FA Tech III) was similar to the FA Tech II investment. *Id.* at 3a. Based on the proposed terms, FA Technology Ventures would have earned nearly $7.6 million in management fees from the proposed investment over ten years and could have earned more depending on the investment's performance. *Id.* at 2a-3a. In the initial stages of consideration, the investment received the backing of several

individuals within the Comptroller's Office, including members of the investment staff, a Senior Investment Officer who was in charge of the Fund's in-state investment program, and the First Deputy Comptroller. Gov't C.A. Br. 9-10.

In April 2009—after the Commitment on FA Tech II and before consideration of whether to invest in FA Tech III—the Comptroller's Office adopted a policy of no longer investing in funds marketed by placement agents. Pet. App. 3a. Although FA Technology Ventures had used a placement agent to market FA Tech II, it did not use one to market FA Tech III. *Ibid.* Nevertheless, while the Comptroller's Office was considering whether to invest in FA Tech III, the New York Attorney General's Office advised the Comptroller's General Counsel (Luke Bierman) that the placement agent FA Technology Ventures had used to market FA Tech II was under investigation and that the Comptroller's Office should avoid association with that agent. *Ibid.*; Gov't C.A. Br. 11. Although FA Technology Ventures had not used that placement agent (or any placement agent) in marketing FA Tech III, the two investments were in substance the same. Pet. App. 3a. Bierman therefore made a written recommendation to the Comptroller, based on information provided by the Attorney General's Office, not to invest in FA Tech III. *Ibid.* On November 13, 2009, after receiving Bierman's recommendation, the Comptroller decided not to approve the investment. *Ibid.* The First Deputy Comptroller communicated that decision to a managing partner at FA Technology Ventures (who was not petitioner). *Ibid.* That partner had already heard of Bierman's opposition to the investment; he had also heard rumors that Bierman was having an extramarital affair. *Ibid.*

On November 17, 2009, General Counsel Bierman received an anonymous e-mail at work purporting to be from a colleague in the Comptroller's Office. Pet. App. 4a; J.A. 56. The e-mail stated that the sender had "stumbled upon a serious ethical issue in the Comptroller's Office" and requested Bierman's personal e-mail address so that the sender could convey the information without fear of repercussions. *Ibid.* Bierman responded to the e-mail, noting his concern about the anonymous e-mailer's allegations and advising the e-mailer to contact the Inspector General. Pet. App. 4a; J.A. 57. Bierman also provided his own personal e-mail address, as requested. *Ibid.*

On November 18, 2009, the anonymous author sent an e-mail to Bierman's personal e-mail address. Pet. App. 4a; J.A. 59-62. The e-mail opened by stating: "I am glad we are handling this ethics situation through your personal email, because this ethics issue involves YOU." J.A. 59. The e-mail went on to state: "Last week u did something that was wrong. U blackballed a recommendation on a fund from the investment staff becuz they had a relationship with a friend of mine." *Ibid.* The e-mail then stated that the sender was aware that Bierman was having an extramarital affair and threatened to expose that fact to, *inter alia*, Bierman's wife, the Inspector General, then-New York Attorney General Andrew Cuomo, and the *Albany Times Union* newspaper. J.A. 60-61. In order to avoid such exposure, the e-mailer demanded that Bierman inform his coworkers by November 20 that he had "had a change of heart" about FA Tech III and that he "now recommend[s] moving forward with this fund and accepting the decision of the investment staff." Pet. App. 4a; J.A. 60. The e-mail instructed Bierman to explain his change of heart

by claiming that, upon a review of the files, he had realized "that this fund is very important to the In State investing program" and that "to not do this fund would cause terrible disaster to the In State investing program." *Ibid.* The e-mail closed by stating that the sender had undertaken these efforts because he "just want[ed] [the Comptroller's] office to function normally." J.A. 61.

Approximately ten hours later, the anonymous e-mailer sent another e-mail, warning Bierman that he had "36 hours left" in which to "make the wrong right." J.A. 63. A similar e-mail followed the next morning, advising Bierman that he had "24 hours left." J.A. 64. On the afternoon of November 19, the e-mailer sent another e-mail to Bierman (at both his home and work e-mail addresses), purporting to ask for advice on a letter he had drafted to Attorney General Cuomo exposing the alleged extramarital affair. J.A. 65-66. The e-mail stated that Bierman is "an expert in the law" and asked for comments on the letter, which the e-mailer threatened to send "next week." J.A. 65. It also stated that if Bierman did not like the draft letter, he "should go forward with the other solution" suggested in the previous e-mails. *Ibid.* The "draft letter" to Attorney General Cuomo identified seven problems allegedly caused by the extramarital affair, including the "creation of enemies list holding up approval of wise investments vetted by the investment staff." J.A. 69.

On the advice of law enforcement agents, on November 20, 2009, the General Counsel responded to the e-mailer asking for more time. Pet. App. 4a; J.A. 67. On Monday, November 23, the e-mailer assured the General Counsel that he would "never hear about this again" if he could "get this fixed by Wednesday," November 25.

Pet. App. 4a; J.A. 70. On December 1, the anonymous e-mailer sent a final message, this time referring to Tiger Woods and stating, "who would have thought that a woman could get that upset . . . and over what?" J.A. 73.

The Federal Bureau of Investigation traced some of the e-mails to petitioner's home in Brookline, Massachusetts. Pet. App. 4a. After law enforcement officers executed a search warrant at petitioner's home, petitioner admitted to sending the anonymous e-mails and a forensic examination confirmed that petitioner's computer was the source of the e-mails. *Id.* at 5a.

2. Petitioner was indicted on one count of attempted extortion, in violation of the Hobbs Act, 18 U.S.C. 1951(a), and six counts of interstate transmission of extortionate threats, in violation of 18 U.S.C. 875(d). Under the Hobbs Act, an individual is criminally liable if he "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). Under 18 U.S.C. 875(d), an individual is criminally liable if he, "with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee." The parties in this case agreed that the Hobbs Act's definition of "extortion" also applies to Section 875(d)'s use of the word "extort."

Pet. App. 7a (citing *United States* v. *Jackson*, 180 F.3d 55, 70 (2d Cir. 1999)).

The indictment alleged that petitioner wrongfully attempted to obtain (1) the General Counsel's recommendation to the State Comptroller to approve the Commitment to invest in FA Tech III; (2) the Comptroller's approval of the Commitment; and (3) the Commitment itself. Pet. App. 5a. Before trial, petitioner filed a motion to dismiss the indictment, arguing, *inter alia*, that the indictment failed to state an offense because General Counsel Bierman's recommendation is not "property" within the meaning of Section 1951(b)(2) and because the indictment did not allege that petitioner had threatened any person who had power to issue the Commitment. See *ibid.* The district court denied the motion, explaining that "the General Counsel's right to make professional decisions without outside pressure is an intangible property right," *id.* at 24a, and that the indictment sufficiently alleged that petitioner "interfered with the General Counsel's intangible right for the sake of his own enrichment, thus constituting both a deprivation and an attempt to acquire property under the Hobbs Act," *id.* at 25a.

After a jury trial, petitioner was convicted on the attempted extortion count and on five of the six interstate-transmission counts. Pet. App. 5a-6a. The jury noted on the verdict form that the property petitioner attempted to extort was Bierman's "recommendation to approve the Commitment." J.A. 141-145. Petitioner filed a motion for judgment of acquittal or a new trial based on the alleged insufficiency of the evidence. Pet. App. 6a. The district court denied the motion, finding sufficient evidence that petitioner intended to deprive the General Counsel of "his property right to freely exercise his

independent professional judgment," *id.* at 79a; that petitioner attempted to obtain control of that right for himself, *id.* at 83a; that petitioner believed that his blackmail scheme would lead to a Commitment, *id.* at 85a-86a; and that a Commitment would benefit petitioner financially, *id.* at 87a.

3. On appeal, petitioner again argued that the indictment failed to state an offense and that the evidence was insufficient to support his convictions. See Pet. App. 6a. In support of both contentions, petitioner argued that his conduct did not constitute extortion because the General Counsel's recommendation was not property under the Hobbs Act. *Ibid.* The court of appeals rejected petitioner's arguments. *Id.* at 6a-13a.

The court of appeals observed that the Hobbs Act defines "[t]he term 'extortion' [to] mean[] the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Pet. App. 7a (quoting 18 U.S.C. 1951(b)(2)). In order to determine whether a defendant has "obtain[ed]" or attempted to obtain "property," the court explained that it must undertake a two-part inquiry, determining both "whether the defendant is (1) alleged to have carried out (or, in the case of attempted extortion, attempted to carry out) the deprivation of a property right from another," and whether the defendant did so "with (2) the intent to exercise, sell, transfer, or take some other analogous action with respect to that right." *Id.* at 7a-8a (quoting *United States* v. *Gotti*, 459 F.3d 296, 324 (2d Cir. 2006), cert. denied, 551 U.S. 1144 (2007)). The court further noted that the term "property" under the Hobbs Act "is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right con-

sidered as a source or element of wealth." *Id.* at 8a (quoting *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970)). The court of appeals specifically noted that "[t]he right to pursue a lawful business . . . has long been recognized as a property right," *ibid.* (quoting *Tropiano*, 418 F.2d at 1076), as has the right to "conduct a business free from threats" and "to make various business decisions . . . free from outside pressure." *Ibid.* (quoting *United States* v. *Arena*, 180 F.3d 380, 394 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000), and *Gotti*, 459 F.3d at 327).

The court of appeals concluded that General Counsel Bierman "had a property right in rendering sound legal advice to the Comptroller and, specifically, to recommend—free from threats—whether the Comptroller should issue a Commitment for FA Tech III." Pet. App. 8a-9a. The court rejected petitioner's argument that Bierman's recommendation was not a "source or element of wealth" for Bierman, observing that "[t]he value and worth of a lawyer's services may be said generally to depend on freedom from conflict, including a conflict created by personal blackmail." *Id.* at 9a. In any event, the court noted that a property right need not be a source of wealth to the target of the extortion as long as it has value for the extortionist. *Id.* at 9a-10a.

The court of appeals rejected petitioner's argument that he had not pursued something of value that he could exercise, transfer, or sell. Pet. App. 11a-13a. The court concluded that petitioner not only had attempted to deprive Bierman of his right to make a recommendation to the Comptroller free from blackmail, but also had "attempted to exercise that right by forcing the General Counsel to make a recommendation determined by [pe-

titioner]." *Id.* at 12a. The court acknowledged that a positive recommendation from Bierman would not have guaranteed a Commitment and that a Commitment would not have guaranteed an investment in FA Tech III. *Ibid.* But the court explained that the benefit conferred on the extortionist need not be "direct"; it is sufficient, the court stated, if the extortionist exercises the extorted right for the purpose of obtaining the benefit. *Id.* at 12a-13a. Here, the court concluded that "the evidence showed that a positive recommendation by the General Counsel would have increased the chances the Comptroller would issue a Commitment; a Commitment was necessary for FA Tech III to receive a Pension Fund investment; and an investment would have resulted in management fees for FA Technology and profit for [petitioner], as a managing partner." *Id.* at 13a. Accordingly, the court held, the evidence was sufficient to show that petitioner, "in order to profit, attempted to exercise the General Counsel's property right to make recommendations." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner violated the Hobbs Act by extortion because he attempted to "obtain[] property from another, with his consent, induced by wrongful use of actual or threatened * * * fear." 18 U.S.C. 1951(b)(2).

A. 1. The word "property" has long been understood to include more than just concrete, tangible things. Early dictionary definitions, other secondary sources, and cases from this Court universally defined property to include intangible rights with economic value. Those intangible rights include the exclusive right to use a patented invention, even though the invention is merely the product of the inventor's brain; the right to maintain the viability of a business; the right to pursue a vocation;

the right to acquire property by honest labor; and the right of union members to elect their representatives.

The Hobbs Act, enacted in 1946, was modeled on New York's existing extortion statute and this Court has relied on New York state courts' interpretation of the state law in construing terms in the Hobbs Act. Before 1946, New York courts consistently construed the term "property" in the state extortion statute to include intangible rights with economic value. As early as 1892, New York's highest court explicitly rejected the argument (advanced by petitioner in this case) that property should be limited to tangible articles alone. Instead, the court construed the term to encompass valuable intangible rights such as the right to run a business and the right to labor.

When Congress enacted the Hobbs Act, it did so against the well-established background principle that property is a broad legal term that includes certain intangible rights. Federal courts of appeals applying the Hobbs Act have consistently interpreted the law to cover extortion involving intangible property, including valuable rights considered as a source or element of wealth. That is consistent with this Court's more recent view of the term "property," as used in the federal mail fraud statute. *Carpenter* v. *United States*, 484 U.S. 19 (1987). Nothing in the text, structure, or enactment history of the Hobbs Act indicates a congressional intent to depart from that broad meaning of the word "property."

2. The term "property" encompasses the intangible right to pursue one's existing business or occupation free from improper interference. The right to work in order to earn a living is among the most important intangible rights protected as property, as a variety of

sources of law recognize. And applying that understanding to the Hobbs Act, as courts of appeals uniformly have done, accords with New York courts' view of the pre-1946 state extortion law on which the Hobbs Act was modeled.

If the Court were to agree with petitioner that property under the Hobbs Act does not encompass valuable intangible economic rights such as the right to run a business or to labor, it would frustrate one of Congress's core objectives in enacting the Act: to fight racketeering. Organized crime often uses extortion to usurp control of legitimate businesses and labor unions. The Hobbs Act was aimed at that conduct and petitioner's theory could exclude it.

3. General Counsel Bierman was employed to give disinterested legal advice to the New York State Comptroller. His ability to provide that advice to earn a living is a property right under the Hobbs Act. A lawyer's advice is the product he sells to his client; it is the source of his livelihood. The recommendation and the lawyer's right to make the recommendation represent the same property right, *i.e.*, the right to engage in his profession by giving disinterested legal advice to his client. When petitioner attempted to use blackmail to direct the content of Bierman's recommendation, he attempted to exercise Bierman's right to control his own labor. That is extortion.

B. Petitioner also satisfied the Hobbs Act's requirement that he obtain or attempt to obtain the property in question. An extortionist may obtain property even though it is intangible as long as he seeks to exercise, transfer, or sell the valuable right that is the property. In this case, petitioner sought to direct the substance of Bierman's recommendation to the Comptroller, thereby

attempting to obtain and exercise Bierman's intangible property right to give his own disinterested legal advice to his client.

The Hobbs Act's requirements that an extortionist attempt to "obtain[]" the property in question, and that he use "wrongful" threats of force, violence, or fear avoid the hypotheticals petitioner fears, *e.g.*, that any labor negotiation or social protest could be prosecuted as extortion. A labor union legitimately negotiating for higher wages does not use wrongful threats to do so. And anti-segregation protestors were not trying to obtain anyone's property by, for example, forcing restaurant owners to serve them without charging a fee.

For the same reason, construing property in the Hobbs Act to include intangible rights does not eradiate the distinction that existed in 1946 between the New York laws of extortion and coercion. Extortion includes coercion because every extortion requires that a defendant use coercive means. But if a defendant does not obtain property—either because his scheme does not involve property that is obtainable or because obtaining property is not the object of the defendant's coercive scheme—then he is not guilty of extortion. Here, petitioner's effort to obtain Bierman's right to control the substance of his own recommendation places petitioner's crimes on the extortion side of the line.

C. Interpreting property under the Hobbs Act to include intangible rights, such as those at issue here, would not violate federalism principles. Congress well knew that the Hobbs Act reaches conduct already punishable under state law, but sought to use its powers under the Commerce Clause to the fullest extent possible. Petitioner's artificial limitations would frustrate, not further, Congress's objective.

Similarly, the rule of lenity has no role to play in this case. That tie-breaking rule comes into play only when competing interpretations of a statute are in equipoise. Here, the traditional meaning of the word "property" in federal law—and, more importantly, in New York cases interpreting the state extortion law on which the Hobbs Act was modeled—demonstrate that the term "property" in the Hobbs Act encompasses valuable intangible property rights, including General Counsel Bierman's right to give disinterested legal advice to his client.

ARGUMENT

PETITIONER ATTEMPTED EXTORTION UNDER THE HOBBS ACT WHEN HE SOUGHT TO GAIN CONTROL OF THE GENERAL COUNSEL'S RECOMMENDATION TO THE STATE COMPTROLLER THROUGH BLACKMAIL

The Hobbs Act provides criminal penalties for anyone who "in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). No one disputes that petitioner's means (*i.e.*, blackmail) were extortionate. See *United States* v. *Nardello*, 393 U.S. 286, 295-296 (1969) (holding that scheme to lure individuals into compromising situation and then blackmail them with threat of exposure to obtain money "f[e]ll within the generic term extortion"). Petitioner argues instead that he did not commit extortion because he did not attempt through his blackmail scheme to "obtain[] property," as required by Section 1951(b)(2). Petitioner is incorrect. Property under the Hobbs Act includes both tangible and intangible property, including the

right to run a business, to labor, and to engage in one's chosen profession. A defendant obtains, or attempts to obtain, a victim's property when he uses blackmail to obtain, with the victim's consent, the victim's right to perform his professional duties, including by dictating the substance of a lawyer's legal advice to a client.[1]

A. The General Counsel's Right To Give Disinterested Legal Advice To The State Comptroller Free From Threats Is Property Under The Hobbs Act

The Hobbs Act does not define the term "property." But when the Hobbs Act was enacted in 1946, Congress would have understood the term to be expansive, covering tangible items and intangible rights with economic value. This Court has recognized, moreover, that because the Hobbs Act was modeled on the State of New York's extortion law, it should be construed against the

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[1] Petitioner was also convicted on five counts of transmitting in interstate commerce a communication threatening to injure the reputation of the addressee with the intent to extort from any person "any money or other thing of value," in violation of 18 U.S.C. 875(d). The parties conceded, as the Second Circuit had previously held, that the term "extort" in Section 875(d) is coextensive with the concept of "extortion" as used in Section 1951(b)(2). See Pet. App. 7a (citing *United States* v. *Jackson*, 180 F.3d 55, 70 (2d Cir. 1999)). That makes sense in light of the Second Circuit's broad—and correct—interpretation of the word "property" in Section 1951(b)(2). If this Court agrees that the term property in the Hobbs Act includes intangible rights with economic value, that would support affirmance of all of petitioner's counts of conviction. If the Court does not agree, it should leave open for another case the question whether the term "extort" in Section 875(d) does embrace such intangible rights. As noted, Section 875(d) refers to the extortion of "any money or other thing of value." Even if the Court were to hold that property in the Hobbs Act does not carry its ordinary broad meaning, that would not require a holding that "thing of value" in Section 875(d) is similarly limited.

backdrop of New York state cases interpreting that law. *Scheidler* v. *NOW*, 537 U.S. 393, 403 (2003); *Evans* v. *United States*, 504 U.S. 255, 261 n.9 (1992); *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973). Those cases make clear that "property," as used in New York's extortion law, encompasses General Counsel Bierman's recommendation—and his right to make his own recommendation—about whether the Comptroller should invest in petitioner's company's fund.

1. Property under the Hobbs Act is not limited to tangible property, but includes intangible rights with economic value

Petitioner suggests (see Br. 26, 34-35) that this Court should limit the meaning of the term "property," as used in the Hobbs Act, to include only "concrete" or tangible property. That suggestion is inconsistent with the well-recognized legal meaning of the term, with this Court's pre-Hobbs-Act treatment of it, and with New York courts' pre-1946 interpretation of the New York extortion law on which the Hobbs Act was based.

a. Property has traditionally been understood to include intangible rights with economic value

When Congress enacted the Hobbs Act, the common understanding of the term "property" was expansive. *Webster's Dictionary* defined the term in "a broad sense" to include "any valuable right or interest considered primarily as a source or element of wealth." *Webster's New International Dictionary of the English Language* 1718 (1917) (*Webster's Dictionary*).[2] *Black's Law Dictionary* similarly defined "property" to "extend

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[2] The second edition of *Webster's New International Dictionary* published in 1958, contained the same definition.

to every species of valuable right and interest." *Black's Law Dictionary* 1446 (3d ed. 1933); see 50 C.J. *Property* § 2, at 729 (1930) ("[T]he term 'property' is, in law, a generic term of extensive application. It is a term of large import, of broad and exceedingly complex meaning, of the broadest and most extensive signification, a very comprehensive word, and is the most comprehensive of all terms which can be used.").

Property was widely understood to include both tangible property and intangible property. *Webster's Dictionary* specified that property "include[s] various incorporeal rights." *Webster's Dictionary* 1718. The Restatement of the Law of Property noted that property may include "an intangible," including "right[s], privilege[s], power[s] and immunit[ies]." Restatement of the Law of Property ch. 1, intro. note (1936) (internal quotation marks omitted). And *Corpus Juris* specified that "property may be classified as either corporeal or incorporeal, or as tangible or intangible." 50 C.J. *Property* § 15, at 744 (1930).

b. This Court has long held that property includes intangible rights with economic value

By 1946, this Court's cases had also established that the term "property" is not limited to tangible objects such as real property and personal property. In 1888, for example, the Court recognized that the issuance of a patent on an invention creates a property interest in the invention even though the invention itself "is the product of the inventor's brain." *Marsh* v. *Nichols, Shepard & Co.*, 128 U.S. 605, 612. The property acknowledged in *Marsh* was not the physical piece of paper issuing the patent—the patent itself was merely "evidence of" and "created" the property, which the Court described as

the inventor's "exclusive right to the use of the invention." *Ibid.*

The Court has, in a variety of contexts, declared an array of intangible interests to be property. For purposes of the Due Process Clause, for example, property includes such intangibles as the viability of an individual's business as well as "free access for employees, owner, and customers to his place of business." *Truax* v. *Corrigan*, 257 U.S. 312, 327 (1921); see *Dent* v. *West Va.*, 129 U.S. 114, 121-122 (1889) (noting that the right to pursue one's vocation is of great value to its possessor and cannot be deprived without due process "any more than [one's] real or personal property can be thus taken"). Similarly, in applying the rule that a court of equity's jurisdiction is limited to the protection of "property rights," the Court has held that a newspaper's intangible "right to acquire property by honest labor or the conduct of a lawful business" is property. *International News Serv.* v. *The Associated Press*, 248 U.S. 215, 236 (1918).

The Court took a similarly broad view of property in interpreting the Clayton Act, which authorized injunctions only when necessary to prevent injury "to property, or to a property right." 29 U.S.C. 52. In such cases, the Court found the requisite property or property right in the intangible ability of employees to select their labor representatives, *Texas & New Orleans R.R. Co.* v. *Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 571 (1930); in a businessman's intangible "unrestrained access to the channels of interstate commerce," which were obstructed by a labor boycott, *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465 (1921); and in an employer's intangible ability to ensure that its employees have access to its business premises, *American Steel*

Foundries v. *Tri-City Cent. Trades Council*, 257 U.S. 184, 204-205 (1921).

Even when the Court has used the word "property" to refer to a physical thing, moreover, the Court has made clear that it also referred to the intangible rights "inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945). The Court explained in that case that the more limited approach of construing property to apply only to tangible items amounts to using the term in "its vulgar and untechnical sense" rather than "in a more accurate sense to denote the" intangible interests associated with ownership of tangible things. *Id.* at 377-378. Indeed, the Court has noted that it is "elementary" that "[p]roperty is more than the mere thing which a person owns." *Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917). Rather, it "consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." *Ibid.* (quoting 1 William Blackstone, *Commentaries* *134); see *Crane* v. *Commissioner*, 331 U.S. 1, 6 (1947) (noting that the "ordinary, everyday" understanding of "property" includes "the aggregate of the owner's rights to control and dispose of [a physical] thing"); see also *Dobbins* v. *Los Angeles*, 195 U.S. 223, 236 (1904) (describing constitutional rights "to use and enjoy property").

c. Before 1946, New York courts construing the State's extortion law interpreted property to include intangible rights with economic value

As this Court has recognized, Congress modeled the Hobbs Act on New York's then-existing extortion statute, N.Y. Penal Law §§ 850, 851 (Consol. 1909), and on a 19th-century model penal code known as the Field Code,

Commissioners of the Code, *The Penal Code of the State of New York* §§ 613, 614 (1865) (Field Code). See *Scheidler*, 537 U.S. at 403; *Evans*, 504 U.S. at 261 n.9; *Enmons*, 410 U.S. at 406 n.16. Like the Hobbs Act does now, both the New York statute and the Field Code defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." N.Y. Penal Law § 850 (Consol. 1909); Field Code § 613. Both codes also provided that the requisite "fear" in the extortion provisions "may be induced by a threat * * * [t]o do an unlawful injury to * * * property." N.Y. Penal Law § 851 (Consol. 1909); Field Code § 614. This Court has repeatedly looked to New York's pre-1946 "[j]udicial construction of the New York statute" when interpreting the scope of the extortionate acts prohibited by the Hobbs Act. *Enmons*, 410 U.S. at 406 n.16; see also *Scheidler*, 537 U.S. at 403-404; *Evans*, 504 U.S. at 261 n.9. The consistent judicial construction of the term "property," as used in the New York extortion law, encompassed intangible interests that had economic value.[3]

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[3] As noted, the New York Code used the term "property" twice in defining the crime of extortion—first to describe what an extortionist obtains and then to describe one type of threat (a threat to injure property) that an extortionist may employ. N.Y. Penal Law §§ 850, 851 (Consol. 1909). In construing the meaning of the term "property," New York courts generally have not drawn a distinction between the two uses. See, *e.g.*, *People ex rel. Short* v. *Warden of City Prison*, 130 N.Y.S. 698, 700 (N.Y. App. Div. 1911) (construing "property" as used in both Sections 850 and 851 to include labor and the right to labor), aff'd, 99 N.E. 1116 (N.Y. 1912). Nor is there any basis in the statute to do so. Indeed, after the enactment of the Hobbs Act, New York's highest court held (relying on *People* v. *Barondess*, 31 N.E. 240, 242 (N.Y. 1892), and *Short*, 130 N.Y.S. at 698), that it was "not

In *People* v. *Barondess*, 31 N.E. 240, 242 (N.Y. 1892), New York's highest court explained that the term "property" should be understood "in its broad and unrestricted sense." The court considered whether property referred only to the physical place and possessions of a business rather than to the business owner's intangible right to operate the business without suspension or interruption. *Id.* at 241-242. And the court held that "[t]here would obviously be no reason" to limit the term "to tangible articles" alone. *Id.* at 242. A year later, relying on *Barondess*, the same court held that a threat to compel customers to withdraw from a business was "a threat to do an unlawful injury to property." *People* v. *Hughes*, 32 N.E. 1105, 1107-1108 (N.Y. 1893). The property at issue in that case was again the victim's business—not in the sense of his tangible place of work, but in the sense of his intangible ability to operate his company for a profit without undue interference.

The principle that property in the extortion context includes intangible interests with economic value was reaffirmed in *People ex rel. Short* v. *Warden*, 130 N.Y.S. 698 (N.Y. App. Div. 1911), aff'd, 99 N.E. 1116 (N.Y. 1912), which held that the term "embrace[s] every species of valuable right and interest." *Id.* at 700. The intermediate appellate court explained that "whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property." *Ibid.* Applying a broad conception of property to the facts of the case, the court held that a house painter's employment qualified as property such that a threatened loss of his job was a threat to injure property

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disposed" to construe "property" to mean different things in each provision. *People* v. *Spatarella*, 313 N.E.2d 38, 39-40 (N.Y. 1974).

within the meaning of the law. *Id.* at 701.[4] Since the enactment of the Hobbs Act, New York courts have continued to interpret the term "property" in the State's traditional extortion law and its more modern larceny laws (which now encompass the crime of extortion, see N.Y. Penal Law § 155.05(e) (McKinney 2013)) to include such intangible rights. See, *e.g.*, *People* v. *Capparelli*, 603 N.Y.S.2d 99, 105 (N.Y. Sup. Ct. 1993) (holding that a construction contract qualified as property); *People* v. *Capaldo*, 572 N.Y.S.2d 989, 992 (N.Y. Sup. Ct. 1991) (holding that property includes a union contract); *People* v. *Garland*, 505 N.E.2d 239, 239-240 (N.Y. 1987) (holding that a tenant's right to occupy and possess an apartment is property that may be the subject of larceny by extortion); *People* v. *Spatarella*, 313 N.E.2d 38, 40-41 (N.Y. 1974) (holding that property includes a business arrangement with a customer); *People* v. *Wisch*, 296 N.Y.S.2d 882, 885-886 (N.Y. Tr. Term 1969) (rejecting argument that property is limited to tangible property in holding that a milk route constitutes property).

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[4] Other pre-Hobbs-Act decisions of the New York courts also held that the extortion statute protects intangible property rights. See *People* v. *Sheridan*, 174 N.Y.S. 327, 329 (N.Y. App. Div. 1919) (depriving victim of use of elevator on his business premises would be injury to property); *People* v. *Weinseimer*, 102 N.Y.S. 579, 587 (N.Y. App. Div. 1907) (preventing union members from doing plumbing work on building project would be injury to property), aff'd, 83 N.E. 1129 (N.Y. 1907). And in other contexts before 1946, the New York courts recognized as property such intangible rights as the unimpeded exercise of the functions of an elected union office, *Bianco* v. *Eisen*, 75 N.Y.S.2d 914, 916 (N.Y. Sup. Ct. 1944); "work and the right to earn a living," *Caufield* v. *Moreschi*, 40 N.Y.S.2d 757, 762 (N.Y. Sup. Ct. 1943); and the right to participate in a union election, *Dusing* v. *Nuzzo*, 29 N.Y.S.2d 882, 884 (N.Y. Sup. Ct. 1941), aff'd, 31 N.Y.S.2d 849 (N.Y. App. Div. 1941).

d. Property in the Hobbs Act includes intangible rights with economic value

The term "property" in the Hobbs Act should be given the same broad construction. When Congress enacted the Hobbs Act, it legislated against a well-established background principle—recognized in this Court's cases, in New York state cases, in contemporary dictionaries, and in foundational sources such as Blacktsone's *Commentaries*—that property includes intangible interests with economic value. Consistent with that understanding, in the first appellate decision to consider the issue under the Hobbs Act, the Second Circuit held that defendants who threatened owners of a garbage-removal company with physical violence unless they stopped soliciting customers in certain areas—customers who had previously used the defendant's garbage-removal services—were guilty of extorting the owners' intangible property "right to solicit business from anyone in any area without any territorial restrictions" imposed by defendants. *United States* v. *Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970). The Second Circuit explained that property extends beyond tangible things to include "any valuable right considered as a source or element of wealth." *Id.* at 1075 (citing *Bianchi* v. *United States*, 219 F.2d 182 (8th Cir.), cert. denied, 349 U.S. 915 (1955)). Every court of appeals that has considered the question has held that property in the Hobbs Act includes intangible rights with economic value.[5]

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[5] See, *e.g.*, *United States* v. *Cain*, 671 F.3d 271, 282 (2d Cir.), petition for cert. pending, No. 12-9125 (filed Mar. 6, 2013), cert. denied, 132 S. Ct. 1872 (2012); *United States* v. *Thompson*, 647 F.3d 180, 186 (5th Cir. 2011); *United States* v. *Vigil*, 523 F.3d 1258, 1264 (10th Cir.), cert. denied, 555 U.S. 886 (2008); *United States* v. *Gotti*, 459 F.3d 296,

Although this Court has not yet passed on the scope of property protected by the Hobbs Act, it has made clear in an analogous context that the term "property" embraces intangible rights as well as tangible things. In *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987), the Court declined to hold that the term "property," as used in the mail fraud statute, 18 U.S.C. 1341, is limited to tangible property. The Court instead noted that intangible "[c]onfidential business information has long been recognized as property" and held that a newspaper "had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents" of such confidential information. *Carpenter*, 484 U.S. at 26; see *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1000-1004 (1984) (for purposes of the Takings Clause, property includes "intangible" right to control confidential business information such as trade secrets). Petitioner is certainly correct (see Br. 24-25) that the term "property" does not encompass all intangible

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323 (2d Cir. 2006), cert. denied, 551 U.S. 1144 (2007); *United States* v. *Pellicano*, 135 Fed. Appx. 44, 46 & n.2 (9th Cir. 2005); *Libertad* v. *Welch*, 53 F.3d 428, 444 n.13 (1st Cir. 1995); *United States* v. *Debs*, 949 F.2d 199, 201-202 (6th Cir. 1991), cert. denied, 504 U.S. 975 (1992); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), cert. denied, 493 U.S. 901 (1989); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 288 & n.23 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); *United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985), cert. denied, 475 U.S. 1024 (1986); *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), cert. denied, 450 U.S. 916, 450 U.S. 985, and 452 U.S. 905 (1981); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978) cert. denied, 440 U.S. 910 (1979); *United States* v. *Franks*, 511 F.2d 25, 32 n.8 (6th Cir.), cert. denied, 422 U.S. 1042, and 422 U.S. 1048 (1975); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973).

rights. The Court held in *McNally* v. *United States*, 483 U.S. 350, 355, 360 (1987), for example, that the term (as used in the mail fraud statute) does not include a State's intangible right to honest services where the State was not deprived of money, property, or control over its money or property. But the Court in *Carpenter* specifically rejected the argument that *McNally* "limit[ed] the scope of [the mail fraud statute] to tangible as distinguished from intangible property rights," even in a criminal prosecution such as was at issue in *Carpenter*. 484 U.S. at 25.

Nothing in the text or structure of the Hobbs Act indicates a congressional intent to give the term "property" anything other than its traditionally broad meaning. Petitioner argues (Br. 34-35) that the Hobbs Act's prohibition of interference with commerce by "threaten[ing] physical violence to * * * property," 18 U.S.C. 1951(a), requires the Court to limit meaning of property throughout the Act to tangible things. That is not so. It is true that intangible property rights—such as the right to the exclusive use of a patented invention and the right to control the timing of publication of confidential business information—cannot be subject to physical violence. Such forms of property therefore will not form the basis for criminal liability under that particular prohibition in the Hobbs Act. But that does not make them any less property, either in the general sense of the word or as used in the Hobbs Act. If a defendant threatened to kill a newspaper columnist if he did not give the defendant confidential information scheduled for publication the next week, he would surely be guilty of extorting or attempting to extort the columnist even though the confidential information and the right to control its release (both considered property by this

Court in *Carpenter*, see 484 U.S. at 26) are not capable of being harmed through physical violence. The same would be true if the object of the extortion were an intangible such as a copyright, a patent, stock ownership, or a contract right.

Petitioner suggests (see Br. 22) that this Court eschewed a similarly broad definition of property for purposes of the Hobbs Act in *Scheidler* v. *NOW*, 537 U.S. 393 (2003). That is not the case. The Court in *Scheidler* did not address the scope of the word "property" in the Hobbs Act. The Court instead considered whether the property alleged to have been extorted in that case—the intangible right of abortion clinics to exercise exclusive control over their business assets—was "obtain[ed]" within the meaning of the Hobbs Act such that it would support a civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* *Scheidler*, 537 U.S. at 401. The Court held that, even if the defendants had deprived the clinics of a property right, they had not "obtain[ed]" the right, as required by the Act. *Id.* at 405. In so holding, the Court noted that the defendants had "neither pursued nor received 'something of value from' [the clinics] that they could exercise, transfer, or sell," *ibid.* (quoting *Nardello*, 393 U.S. at 290), implying that something of value that could be exercised, transferred, or sold would qualify as property that could be extorted. The Court explicitly declined to address the long line of court of appeals cases (starting with *Tropiano*) holding that the intangible right to make business decisions free of improper influence constitutes property. *Id.* at 402 n.6. And the Court acknowledged its holding in *Carpenter* "that confidential business information constitutes 'property' for purposes of the federal mail fraud statute." *Id.* at 402. The

Court's decision in *Scheidler* certainly sheds light on whether petitioner attempted to obtain property when he attempted to blackmail General Counsel Bierman to change his recommendation to petitioner's liking. See pp. 39-42, *infra*. It does not, however, cast doubt on the longstanding consensus that property in the Hobbs Act includes intangible rights with economic value. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 732 (1998) ("[T]here is a consensus that the concept of property includes the rights of persons with respect to both tangible and intangible resources.").

e. A broad interpretation of property is consistent with the common-law crime of extortion

Nothing in the common law of extortion indicates that property in this context was traditionally limited to tangible items. At common law, extortion was limited to corrupt acts by public officials for the performance of official duties. *Evans*, 504 U.S. at 260. Most prosecutions involved the corrupt official's taking of money—but the widespread consensus was that extortion extended to taking any "thing of value." 1 Wm. Oldnall Russell, *A Treatise on Crimes and Misdemeanors* 573-574 (8th ed. 1923) ("*Extortion* * * * signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value."); 2 Joel P. Bishop, *Bishop on Criminal Law* § 401, at 331-332 (9th ed. 1923) ("In most cases, the thing obtained is money. * * * But probably anything of value will suffice."); 3 Francis Wharton, *A Treatise on Criminal Law* § 1898, at 2095 (11th ed. 1912) ("it is enough if any valuable thing is received"); Edward Coke, *The First Part of the Institutes of the Lawes of England*, at 368b (1628) ("Extortion * * * is a great misprision, by wresting or unlaw-

fully taking by any Officer, by colour of his Office, any money or valuable thing."); 4 William Blackstone, *Commentaries* *141 (extortion is "an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value."). The phrase "thing of value" is today recognized to include intangible rights. See, *e.g.*, *United States* v. *Girard*, 601 F.2d 69, 71 (2d Cir.), cert. denied, 444 U.S. 871 (1979); cf. *Bell* v. *United States*, 462 U.S. 356, 360 (1983).

As this Court has noted, "[a]bsent contrary direction from Congress," the Court "presum[es] that a statutory term has its common-law meaning." *Scheidler*, 537 U.S. at 402. At common law, an official would have been guilty of extortion if he had required a carpenter to pay money (not required by law) to the official in exchange for a license to operate his business. Such an official would surely have been just as guilty of extortion if he had required the carpenter to build a barn behind the official's house rather than to pay money. When it enacted the Hobbs Act, Congress unquestionably expanded extortion by extending it to private actors. But nothing in the Act or its enactment history indicates an intent to jettison the common-law understanding that intangible things of value are capable of being extorted.

2. The right to pursue one's existing business or occupation free from improper interference qualifies as property under Section 1951(b)(2)

The traditional concept of property in our legal system embraces intangible rights with economic value. At the core of those intangible rights protected as property is the right to pursue one's livelihood. The major source of wealth in the lives of most people is their business or job. The right to run a business or to pursue a job with-

out unlawful outside interference is undoubtedly a "thing of value" to everyone who runs a business or has a job. Such a right is therefore property that can be extorted if it is obtained by another through the wrongful use of actual or threatened force, violence, or fear.

a. As noted, before the enactment of the Hobbs Act, this Court had consistently considered intangible rights related to the operation of a business or the employment of one's labor to be property for purposes of the Due Process Clause or the Clayton Act. See, *e.g.*, *Truax*, 257 U.S. at 327 ("Plaintiffs' business is a property right * * * and free access for employees, owner and customers to his place of business is incident to such right."); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465 (1921) ("complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference" from a secondary boycott designed to coerce customers to take their business elsewhere); *Dent*, 129 U.S. at 121-122 ("The interest, or, as it is sometimes termed, the estate acquired in [a source of livelihood]—that is, the right to continue [its] prosecution—is often of great value to the possessor[], and cannot be arbitrarily taken from [him], any more than [his] real or personal property can be thus taken.").

Beginning with *Tropiano*, the courts of appeals have uniformly agreed that a person's intangible right to pursue a business, including the right to make business decisions, is property under the Hobbs Act. See, *e.g.*, *United States* v. *Cain*, 671 F.3d 271, 282 (2d Cir.) (right to solicit accounts), petition for cert. pending, No. 12-9125 (filed Mar. 6, 2013), cert. denied, 132 S. Ct. 1872 (2012); *United States* v. *Thompson*, 647 F.3d 180, 186 (5th Cir. 2011) (a person's "labor * * * qualifies as

'property'"); *United States* v. *Vigil*, 523 F.3d 1258, 1264 (10th Cir.) (right to "decide with whom to work"), cert. denied, 555 U.S. 886 (2008); *United States* v. *Pellicano*, 135 Fed. Appx. 44, 46 & n.2 (9th Cir. 2005) (right of newspaper to decide what to publish); *Doe I* v. *Unocal Corp.*, 395 F.3d 932, 961 (9th Cir. 2002) ("right to make personal and business decisions about one's own labor"); *United States* v. *Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992) (right of towing company to decide when to release impounded vehicle); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1350 (3d Cir.) ("right to continue to operate [a] business"), cert. denied, 493 U.S. 901 (1989); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986) (right to make "business decisions"), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985) (right to decide what insurance to purchase), cert. denied, 475 U.S. 1024 (1986); *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980) (right to solicit business), cert. denied, 450 U.S. 916, and 450 U.S. 985, and 452 U.S. 905 (1981); *United States* v. *Santoni*, 585 F.2d 667, 672-673 (4th Cir. 1978) (right to decide to whom to award a subcontract), cert. denied, 440 U.S. 910 (1979). Courts of appeals similarly agree that property under the Hobbs Act encompasses "the business rights of [labor] unions," including the economically valuable right of union members to democratic participation in union affairs and to the loyal service of their union officials, as guaranteed by the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411. *United States* v. *Debs*, 949 F.2d 199, 201-202 (6th Cir. 1991), cert. denied, 504 U.S 975 (1992); see *United States* v. *Coppola*, 671 F.3d 220, 233-234 (2d Cir. 2012), cert. denied, 133 S. Ct. 843 (2013); *United States* v. *Gotti*, 459 F.3d 296, 324 n.9 (2d

Cir. 2006), cert. denied, 551 U.S. 1144 (2007); *United States* v. *Bellomo*, 176 F.3d 580, 592 (2d Cir.), cert. denied, 528 U.S. 987 (1999); *United States* v. *Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281, 288 & n.23 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986).

The New York courts that interpreted the pre-1946 extortion law also uniformly agreed that the intangible rights to run a business, to make business decisions, and to labor were rights that qualify as property for purposes of the extortion law. See, *e.g.*, *Short*, 130 N.Y.S. at 700-701 (right to labor "constitute[s] property"); *Hughes*, 32 N.E. at 1107-1108 (property includes continued relationship with customers free from unlawful interference); *Barondess*, 31 N.E. at 241-242 (business and the running of a business qualify as property); see also *People* v. *Cuddihy*, 271 N.Y.S. 450, 453-454 (N.Y. Ct. Gen. Sess. 1934) (noting that a person's right to labor as he will "is his property" and finding no interference with such property when alleged victim agreed to terms of employment).[6]

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[6] The New York courts' early understanding of the breadth of the word "property" in the extortion context also comports with the understanding of other state courts about the general meaning of the term. See, *e.g.*, *Suckow* v. *Board of Med. Exam'rs*, 187 P. 965 (Cal. 1920) (the right to practice medicine or other profession is a property right); *State* v. *Kramer*, 115 A. 8 (Del. 1921) (threats to get someone fired from his job qualify as threats to harm property for purposes of extortion law); *Eden* v. *People*, 43 N.E. 1108 (Ill. 1896) (property includes the labor of a barbershop owner); *Wood* v. *Security Mut. Life Ins. Co.*, 198 N.W. 573, 575 (Neb. 1924) ("Property, in a broad sense, is defined as any valuable right or interest considered primarily as a source or element of wealth, and includes in modern legal systems practically all valuable rights."); *Purvis* v. *Local No. 500, United Bhd. of Carpenters & Joiners*, 63 A. 585, 588 (Pa. 1906) ("The right of a workman to freely use his hands and to use them for just whom he pleases, upon just such terms as he pleases, is his property,

b. Construing property in the Hobbs Act *not* to include the intangible rights to make business decisions and to labor would frustrate one of the core objectives of the Act, *viz.* to fight racketeering. The predecessor to the Hobbs Act was the Anti-Racketeering Act, ch. 569, 48 Stat. 979. See *United States* v. *Culbert*, 435 U.S. 371, 374 (1978). That law was enacted after the Senate Committee on Interstate Commerce thoroughly investigated "rackets" and "racketeering" in the United States. S. Res. 74, 73d Cong., 1st Sess. (1933). The House Report that accompanied the resulting bill (which ultimately became the Anti-Racketeering Act) stated that it was designed "for the suppression of racketeering in interstate commerce" and explained that "the typical racketeering activities affecting interstate commerce are those in connection with price fixing and economic extortion directed by professional gangsters." H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934).

When Congress replaced the Anti-Racketeering Act with the Hobbs Act in 1946, it broadened the statute's reach by removing an exception to liability for the payment of bona fide wages. See *Culbert*, 435 U.S. at 375 n.5; see also *Enmons*, 410 U.S. at 408 (noting that Congress enacted the Hobbs Act for the limited purpose of "undoing the restrictive impact of" *United States* v. *Local 807 of International Brotherhood of Teamsters*, 315 U.S. 521 (1942)). Although neither the Hobbs Act nor its predecessor reach only racketeering activity, see *Culbert*, 435 U.S. at 374-378, the Act's prohibition against extortion provides a critical anti-racketeering tool. This Court has noted that the crime of "[e]xtortion

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and so in no less degree is a man's business in which he has invested his capital."); *O'Hara* v. *Stack*, 90 Pa. 477 (Pa. 1879) ("A man's profession is his property.").

is typically employed by organized crime to enforce usurious loans, infiltrate legitimate businesses, and obtain control of labor unions." *Nardello*, 393 U.S. at 295 n.13. *Nardello* relied on the 1967 report of the President's Commission on Law Enforcement and Administration of Justice, which explained that organized crime enterprises "acquire[]" "[c]ontrol of business concerns" through, *inter alia*, "using various forms of extortion." *Task Force Report: Organized Crime* 4; *id.* at 5 (when organized crime infiltrates legitimate business, "[s]trong-arm tactics are used to enforce unfair business policy and to obtain customers"). The *Task Force Report* also recognized that racketeers' infiltration of labor unions facilitates extortion of other businesses by enabling the "extorti[on of] money by threats of possible labor strife." *Ibid.*; *id.* at 116 (noting that racketeers used extortion to obtain criminal business monopolies by coercing business owners to sign unfair contracts or intimidating customers, thereby "gaining an exclusive right to [the businesses'] customers").

Hobbs Act prosecutions frequently target extortion that wrests control of the decision-making power of labor unions and legitimate business. If the Court were to adopt petitioner's narrow interpretation of property in the Hobbs Act, the Act would no longer prohibit organized crime enterprises from using force, violence, and threats of harm against unions, businesses, or honest laborers, with a view to usurping control over their economic affairs. Such a result would radically depart from the historic enforcement of the Hobbs Act and the law of extortion generally—and would frustrate Congress's intent.

3. The General Counsel's right to give disinterested legal advice to the State Comptroller in the course of his employment was property

a. Luke Bierman was employed as the General Counsel to the State Comptroller. His job was to provide legal services to his client (the Comptroller), including legal advice and recommendations. His right to provide disinterested legal advice free from unlawful outside influence was property under the Hobbs Act. A lawyer of course plays a distinctive role in rendering advice. But the principle is the same as applied by the New York courts in holding that a house painter's right to do his job and a cloak manufacturer's right to operate its business were property under New York's extortion law. See *Short*, 130 N.Y.S. at 700-701; *Barondess*, 31 N.E. at 240-242. A lawyer's legal opinion, whether presented orally or in writing, is the product that he creates and sells to his client. In the court of appeals' words, the ability to give legal advice is a lawyer's "stock in trade." Pet. App. 8a (quoting *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 237 n.19 (1st Cir. 1997)); see also, *e.g.*, *United States* v. *Jurado*, 996 F.2d 312 (Table), No. 92-2151, 1993 WL 207444, at *2 (10th Cir. June 10, 1993) ("[A] lawyer's stock in trade is his time and advice."); *United States* v. *Bertoli*, 994 F.2d 1002, 1023 (3d Cir. 1993) (same); *United States* v. *Bloom*, 149 F.3d 649, 657 (7th Cir. 1998) (Bauer, J., dissenting) (same).[7]

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[7] It is immaterial that Beirman was a government lawyer instead of a private-sector lawyer. The relationship between the General Counsel and the State Comptroller was no less an attorney-client relationship than that between a private-sector lawyer and his clients. See Proposed Fed. R. Evid. 503(a)(1) (defining the attorney-client privilege to include public entities and officers within its definition of

A lawyer's advice therefore has economic value to the lawyer—it is the source of his livelihood and the labor for which he is compensated. When a lawyer is unable to give his client advice that accords with the lawyer's assessment of the client's best interests and with the requirements of the law, he has nothing of value to sell. A blackmail scheme that deprives a lawyer of his intangible interest in selling his labor deprives the lawyer of his property because it usurps the product that the lawyer uses to earn his livelihood. See *International News Serv.*, 248 U.S. at 236 ("[T]he right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired.").

b. Petitioner's attempts to argue that Bierman has no property interest in his ability to do his job without unlawful interference are unavailing.

First, petitioner argues (see Br. 2, 19, 31-32) that the Court should not even consider whether Bierman's right to make a legal recommendation free from unlawful outside influence is property because the jury's verdict specified that the property petitioner attempted to extort was Bierman's recommendation, not his right to make a recommendation. But Bierman's "recommendation" and his "right to make the recommendation" are merely different expressions of the same property, *i.e.*, his intangible right to give disinterested legal advice to his client. In *Carpenter*, this Court referred to the property at issue as both "[c]onfidential business information" and the "right to decide how to use [such information] prior to disclosing it to the public." 484 U.S. at

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"client"); Restatement (Third) of the Law Governing Lawyers § 74, at 573 (2000) ("[T]he attorney-client privilege extends to a communication of a governmental organization.").

26-27. The recommendation at issue is not the physical piece of paper on which Bierman printed his advice, contrary to petitioner's suggestion (see Br. 26-27). The recommendation is the substance of Bierman's advice, and Bierman's property interest in that advice includes his right to exercise exclusive control over it, *i.e.*, to choose what course of action he will advise his client to take. This Court has long held that "[p]roperty is more than the mere thing which a person owns," but "consists of the free use, enjoyment, and disposal" of what he owns "without control or diminution save by the law of the land." *Buchanan*, 245 U.S. at 74 (quoting 1 William Blackstone, *Commentaries* *134).

Petitioner similarly argues (Br. 35-36) that the Hobbs Act protects "property" but not "property rights" such as are at issue here. This Court long ago rejected such an illogical parsing of the term "property," noting that, even when the property is a tangible thing, the "ordinary, everyday" understanding of the word "property" is not limited to the thing itself but includes "the aggregate of the owner's rights to control and dispose of" the thing. *Crane*, 331 U.S. at 6. Thus, if petitioner had used blackmail to compel Bierman to rent his house to petitioner's mother, he would be guilty of extortion not because he unlawfully obtained Bierman's house, but because he unlawfully obtained Bierman's right to control use of the house. The latter "property right" is no less property than the house itself and plainly falls within the meaning of the term "property" in the Hobbs Act.

Second, petitioner argues that Bierman's recommendation is not property because it cannot be "sold, transferred, or exercised." Br. 26. Petitioner relies on this Court's statement in *Schneider* that the defendants there had not obtained property under the Hobbs Act because

they had "neither pursued nor received 'something of value from' [the clinics] that they could exercise, transfer, or sell." 537 U.S. at 405 (quoting *Nardello*, 393 U.S. at 290). But in so doing, petitioner confuses the inquiry into whether something is property with the inquiry into whether an extortion defendant has obtained such property. The Court in *Scheidler* assumed for the sake of the opinion that the defendants "may have deprived or sought to deprive" the abortion clinics of property (*i.e.*, "something of value"), but held that "they did not *acquire* any such property." *Ibid.* (emphasis added). The Court viewed as distinct the Hobbs Act's requirements that the object of the illegal scheme be "property" and that the defendant seek to "obtain" such property, and there is no reason to collapse those distinct requirements here.

In any case, petitioner is wrong that Bierman's recommendation was not something that could be exercised. Bierman exercised his right to make a responsible legal recommendation when he advised the Comptroller not to invest in petitioner's company's fund. As discussed at pp. 39-42, *infra*, when petitioner attempted to force Bierman to change that recommendation, he attempted to exercise Bierman's right to make his own recommendation. It is of no moment that the Comptroller may or may not have taken Bierman's advice. See Pet. Br. 26. That is the nature of the product a lawyer sells to his client. Petitioner admits that Bierman was being "pressured to change his opinion." *Id.* at 29. Bierman's right to form his own disinterested legal "opinion" and to deliver that opinion to his client is property and by attempting to unlawfully "pressure[]" him to change it, petitioner was attempting to exercise that right for himself, thereby attempting to obtain

Bierman's property "by wrongful use of * * * fear." 18 U.S.C. 1951(b)(2).

Finally, petitioner is incorrect (Br. 18, 26) that Bierman's recommendation had no "intrinsic value." Petitioner obviously viewed Bierman's recommendation as having value—he sought to exercise it to promote his own economic interest. As the district court explained, the jury had ample reason to conclude that petitioner "believed at the time * * * that the General Counsel's negative recommendation was the reason the Commitment was not going forward," Pet. App. 85a, and that, "if the General Counsel changed his recommendation to approve the Commitment, it would set into motion a series [of] events by which the [Pension Fund's] assets would be invested through FA Technologies as had been done in the past," *id.* at 86a. And the evidence in the record established that petitioner's firm stood to earn more than seven million dollars over the first ten years of the investment. J.A. 147.

In addition, as explained above, Bierman's property right to control his recommendation had intrinsic value *to him* because it was the source of his professional livelihood. His right to make his own recommendation cannot be compared to the unissued video poker licenses at issue in *Cleveland* v. *United States*, 531 U.S. 12, 15 (2000). The Court held that those licenses, while they were in the hands of the State, were not property under the mail fraud statue because the State had a regulatory interest in the licenses, not a property interest. *Id.* at 20. The Court reasoned in part that the State earned nearly all of the revenue from the licenses after their issuance, not while the State had control over them. *Id.* at 22. That is not true of Bierman's recommendation. Bierman was hired by the Comptroller's Office to render

his legal services, including by giving the office his disinterested legal advice. Such advice—and, more to the point, the right to give such advice free of unlawful outside influence—therefore had tangible economic value to Bierman (who obviously had no "regulatory" interest in his own ability to conduct himself as a lawyer).

B. Petitioner Attempted To Use Threats Of Fear To "Obtain" The General Counsel's Right To Make A Recommendation To The State Comptroller Within The Meaning Of The Hobbs Act

1. This Court held in *Scheidler* that a person does not commit extortion under the Hobbs Act when he deprives another of property through the wrongful use of force or threats, but does not obtain that property for himself or another. 537 U.S. at 402-405. The property potentially at issue in *Scheidler* was the abortion clinics' "right of exclusive control of their business assets" and there was "no dispute" that the defendants had "interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights." *Id.* at 404-405. But the Court found no extortion because the defendants had not "obtained" (*i.e.*, "gain[ed] * * * possession of") the property at issue. *Id.* at 403-405 & n.8. Because the defendants' ultimate objective was not to "exercise, transfer, or sell" the property at issue, the Court explained, they sought merely to "interfer[e] with or depriv[e]" the clinics of their property, not to obtain it—and had therefore not committed extortion. *Id.* at 405.

This case is not like *Scheidler* because petitioner *did* seek to obtain General Counsel Bierman's intangible property right to give his disinterested legal opinion to his client free of improper outside interference. If the defendants in *Scheidler* had attempted to force the clin-

ics to provide orthopedic services instead of abortion services, or had attempted to shut the clinics down so that defendants could themselves provide abortion-related services to the clinics' patients, they would have committed extortion. The equivalent happened here. The goal of petitioner's blackmail scheme was to replace Bierman's original recommendation with one that petitioner wanted him to make. In so doing, petitioner sought to exercise Bierman's recommendation authority as *petitioner* saw fit, and thereby to usurp Bierman's right to control his own decisions, in violation of the Hobbs Act.

Petitioner asserts that he was simply attempting to "'restrict [Bierman's] freedom of action,' not to acquire his property." Br. 30 (quoting *Scheidler*, 537 U.S. at 405) (alteration in original). His assertion is belied by his own words of blackmail. Petitioner did not attempt to simply restrict Bierman's freedom of action—by, for example, attempting to prevent him from going to work on the day his recommendation was due. Petitioner used threats in an effort to force Bierman to affirmatively "recommend moving forward" with an investment in petitioner's company's fund, J.A. 60; to tell the Comptroller that, based on his review of the files, not investing in the fund would "cause terrible disaster" for the Comptroller's Office, *ibid.*; and to "change [his] recommendation," Pet. Br. 29 (alteration in original). In other words, petitioner attempted to force Bierman to substitute petitioner's preferred recommendation for his own. That is extortion. If petitioner had threatened to burn down a brick-layer's house if the brick-layer did not lay bricks for petitioner's use, there would be no doubt that he would be guilty of extortion. The same would be true if petitioner had threatened to burn down a barber shop

if the barber did not cut his wife's hair for free for a year, or if he had threatened to assault a corporate insider if the insider did not provide him with nonpublic information, or if he had threatened to harm a prosecutor's child if the prosecutor did not secure the indictment of an enemy. In each example, an individual "obtain[s] property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. 1951(b)(2).

Petitioner also warns that "any effort to interfere with an employer's right to determine which workers to hire and how much to pay them could be characterized as extortion." Br. 49; see *id.* at 52. But the Hobbs Act requires that the requisite interference utilize "actual or threatened force, violence, or fear" to qualify as extortion. 18 U.S.C. 1951(b)(2). The Hobbs Act also requires that the use of such threats, force, violence, or fear be "wrongful." *Ibid.* If a labor union pickets a business that the union perceives to be underpaying its employees, the business owner may be "fear[ful]" that he will lose business and may therefore feel pressure to pay his employees more. But this Court has made clear that the "fear" wrought in the business owner would not be "wrongful" in that situation. In *Enmons*, the Court explained the difference between legitimate and wrongful uses of threats or force: "[I]nstances where union officials threatened force or violence against an employer in order to obtain personal payoffs" or "to exact 'wage' payments from employers in return for 'imposed, unwanted, superfluous and fictitious services' of workers" *do* constitute violations of the Hobbs Act because "the alleged extortionist has no lawful claim to that property." 410 U.S. at 400 (footnotes omitted). By contrast, when a union uses "violence to achieve legiti-

mate union objectives, such as higher wages in return for genuine services which the employer seeks," there is no extortion. *Ibid.*

For the same reason, petitioner goes too far in likening himself to "social protestors" such as "anti-segregationists [who] conducted sit-ins at lunch counters to force restaurateurs to serve African-Americans." Br. 51-52. Those protestors were not seeking property to which they were not entitled. They did not use threats of violence to attempt to coerce restaurant owners to serve them food without charging for it. They did not threaten customers of segregated lunch counters with violence if they patronized such an establishment. And they did not attempt to blackmail anyone to relinquish control of his right to engage in his livelihood free of threats.

2. For decades, federal courts of appeals interpreting the Hobbs Act have routinely found criminal extortion when defendants take control or attempt to take control of the operation of a business or other exercise of a person's livelihood. For example, in *United States* v. *Glasser*, 443 F.2d 994, 997-998, 1007-1008, cert. denied, 404 U.S. 854 (1971), the Second Circuit concluded that a defendant was guilty of extortion when he sprayed acid on plate-glass windows installed in businesses by nonunion glaziers in an effort to force business owners to employ only unionized glaziers. The court concluded that the defendant had obtained, *inter alia*, the property right of nonunion glaziers to seek future plate glass installation contracts. *Id.* at 1007; see *United States* v. *Gambino*, 566 F.2d 414, 416-418 (2d Cir. 1977) (defendant guilty of extortion used violence and threats to control the garbage-collection market by obtaining rival company's property "right to solicit [customer] stops"),

cert. denied, 435 U.S. 952 (1978). The Ninth Circuit has similarly found extortion under the Hobbs Act when the defendants used force to obtain a rival business's property "right to solicit business free from threatened destruction." *Zemek*, 634 F.2d at 1163-1164, 1174. And in *Vigil*, 523 F.3d at 1264, the court of appeals concluded that the defendant had sought to "obtain" his victim's "right to decide with whom to work" by improperly using his official power to force the victim to hire his friend's wife. Petitioner likewise sought to obtain a valuable right belonging to Bierman, and thereby sought to obtain his property.[8]

3. Relying on *Scheidler*, petitioner argues (Br. 36-40) that construing extortion in the Hobbs Act to include the extortion of "intangible rights" and the coerced exercise of such rights would be inconsistent with the history of the Hobbs Act because it would collapse the distinction between the pre-1946 New York state crimes of coercion and extortion. Petitioner is incorrect. As the Court held in *Scheidler*, the distinction between the crimes of coercion and extortion is maintained by the requirement that a defendant *obtain property* through the specified unlawful means in order to commit extortion. As long as the property at issue is capable of being obtained (*e.g.*, exercised), and as long as the defendant's objective is

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[8] Similarly, in *People* v. *Spatarella*, *supra*, New York's highest court upheld the state extortion conviction of a refuse collector who threatened a competitor with physical violence if he did not cease providing services to a particular customer the defendant wanted for his own. The court rejected the defendant's claim that he did not "obtain" any property by means of his threats. 313 N.E.2d at 39-40. The court explained that the defendant's conduct had "deprived [the competitor] of [his] business arrangement [with the customer], the advantage of which was obtained by and accrued to the defendant directly in consequence of his extortive activity." *Id.* at 40.

actually to obtain it, a defendant commits extortion through coercive means. If a defendant's coercive measures involve property that is not capable of being obtained (or no property at all), however, he will by definition not be able to obtain it or attempt to obtain it and cannot commit extortion in relation to it.

It is no surprise that extortion and coercion cases will often resemble each other. The crime of extortion requires a defendant to use coercive means; coercion is therefore a "lesser" offense of extortion, 537 U.S. at 405, just as manslaughter is a lesser offense of murder. Accordingly, "coercion and extortion certainly overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property." *Id.* at 407-408. Yet the two will not coincide in all cases. By tradition (and statutory definition), extortion is an economically motivated crime; coercion need not be. Some aspects of human relations are not economic in character. If one man uses threats of violence to force a second man to stop dating the first man's sister, he may be guilty of coercion. But because a person's right to choose his romantic partner is not an inherently economic activity, the coercing party is not guilty of extortion. A person's right to engage in his livelihood, by contrast, does have economic value—and when another person uses threats of violence to usurp that right, often (as here) to his own economic benefit or that of a third party, he commits extortion.

As this Court did in *Scheidler*, petitioner identifies (Br. 37-38) three New York state cases affirming coercion convictions of "individuals who * * * employed threats and acts of force and violence to dictate and restrict the actions and decisions of businesses." 537 U.S. at 406 (citing *People* v. *Ginsberg*, 188 N.E. 62 (N.Y.

1933); *People* v. *Scotti*, 195 N.E. 162 (N.Y. 1934); *People* v. *Kaplan*, 269 N.Y.S. 161 (N.Y. App. Div. 1934)). But nothing in those decisions indicates that the defendants at issue could not have been convicted of extortion. Prosecutors choose not to charge defendants with the most serious available offense every day and it is rarely possible to reconstruct the reasons behind such a charging decision based on the appellate decisions that result years later (particularly one-paragraph decisions as in *Ginsberg* and *Scotti*). As in this case, many defendants who engage in the type of blackmail petitioner engaged in could be charged with extortion, coercion, or both. See *Wisch*, 296 N.Y.S.2d at 844-886 (defendant liable for both coercion and extortion for threatening to ruin milk dealer's businesses if they did not agree to fix prices). Petitioner was charged in federal court with extortion and the jury reasonably concluded that he had attempted to use fear and threats to compel Bierman to exercise his valuable property right to make a legal recommendation to his client in the manner petitioner directed.[9]

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[9] Petitioner also relies on a series of cases cited in the Field Code provision defining the then-separate crime of "larceny." Petitioner asserts that those cases—included in the Code as illustrative of "what property may be the subject of larceny," Field Code § 584, at 211—indicate that "'property' to the drafters of the Field Code meant money, tangible things of value, or notes, bills, or other written documents evidencing money or other tangible property." Pet. Br. 39. Petitioner ignores a critical difference between the Field Code's larceny and extortion provisions, however. "Larceny" was defined in the Field Code as "the taking of *personal property* accomplished by fraud or stealth, or without color of right thereto, and with intent to deprive another thereof." Field Code § 584, at 210 (emphasis added). The phrase "personal property" usually refers to tangible items that can be moved from place to place. As explained in this brief, however, the term "property"—the term actually used in the Field Code's

C. Petitioner's Remaining Arguments Are Without Merit

1. Petitioner argues that allowing petitioner to be punished in the federal system for his blackmail attempt implicates "[f]undamental principles of federalism" because the crime he committed was a state crime. Pet. 45. Petitioner's concern is misplaced. This Court rejected a similar "concern about disturbing the federal-state balance" in *Culbert*, finding "no question that" when Congress enacted the Hobbs Act it "intended to define as a federal crime conduct that it knew was punishable under state law." 435 U.S. at 379. In so doing, Members of Congress raised the same objection petitioner raises, *i.e.*, that it would be "a grave interference with the rights of the States" because "the conduct punishable under the Hobbs Act was already punishable under state robbery and extortion statutes." *Ibid.* Congress rejected those objections, "apparently believ[ing], however, that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce and that the Federal Government had an obligation to do so." *Id.* at 379-380.

This Court has recognized that Congress sought through the Hobbs Act "to use all the constitutional power [it] has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). And that purpose is manifest in the text of the statute, which reaches any robbery or extortionate act that affects commerce "in any way or degree." 18 U.S.C. 1951(a). "[T]he words of the Hobbs Act 'do not lend themselves to restrictive interpretation,'" *Scheidler*, 537 U.S. at 408

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extortion provision, see Field Code § 613, at 220—is much broader and encompasses intangible rights.

(quoting *Culbert*, 435 U.S. at 373), and this Court should reject petitioner's invitation to impose such a restrictive reading on the term "property," as used in the Act.

2. Finally, petitioner also errs in invoking the rule of lenity (or related vagueness principles). Lenity is a tie-breaking rule of statutory construction that applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citation omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citation omitted). "Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved." *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). No such equipoise exists here. The term "property" was broadly understood at the time of the enactment of the Hobbs Act to encompass valuable intangible property rights such as a person's right to labor and conduct his profession, and such property rights were viewed as being obtainable through extortionate means. Viewed in context, the term is not ambiguous, and certainly not "grievous[ly]" so.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2013

APPENDIX

1. 18 U.S.C. 875 provides in pertinent part:

Interstate communications

* * * * *

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

2. 18 U.S.C. 1951 provides in pertinent part:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

AMICUS CURIAE BRIEF

No. 12-357

In The
Supreme Court of the United States

GIRIDHAR C. SEKHAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CATO INSTITUTE IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTION PRESENTED

Whether the "recommendation" of an attorney, who is a salaried employee of a governmental agency, in a single instance, is intangible property that can be the subject of an extortion attempt under 18 U.S.C. § 1951(a) (the Hobbs Act) and 18 U.S.C. § 875(d).

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INTEREST OF AMICI CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Of particular relevance here, NACDL has filed amicus briefs in a number of cases that involve the vagueness and federalism concerns

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[1] Under Sup. Ct. R. 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

that arise from the expansive interpretation of federal criminal statutes.

Amicus Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs. Cato's interest in this case lies in promoting the rule of lenity, an important principle that safeguards individual liberty.

SUMMARY OF ARGUMENT

1. This case illustrates a recurring pattern in federal criminal law: Congress enacts a statute directed at a perceived problem; federal prosecutors press the statute beyond the limits of its language to reach conduct that Congress never contemplated; some lower federal courts accept the increasingly expansive interpretations that prosecutors advance; and, ultimately, this Court steps in to return the statute to the limits that the text and principles of statutory interpretation require. The rule of lenity--under which the Court requires "clear and definite" statutory language before it will choose the harsher of two plausible readings--has played a critical role in establishing limits when the statutory text is ambiguous.

2. In curbing expansive readings of federal criminal statutes, the Court has turned to a second principle of statutory interpretation, in addition to the rule of lenity: that the federal government should not intrude into areas of criminal law enforcement traditionally left to the states, absent a clear statement of Congressional intent. As the Court framed the principle, "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quotation omitted).

3. Petitioner's brief demonstrates that a straightforward application of this Court's decision in *Scheidler v. NOW*, 537 U.S. 393 (2003), requires reversal. But to the extent ambiguity exists in the phrase "obtaining of property from another," the Court should again apply the rule of lenity and the requirement that Congress speak clearly before a federal criminal statute will be interpreted to shift the federal-state balance. Federal prosecutors have successfully urged upon the lower courts a reading of the Hobbs Act that stretches the statutory text beyond its core meaning, beyond what Congress intended in enacting the statute, and into an area that the states traditionally regulate.

ARGUMENT

I. THIS COURT HAS REPEATEDLY APPLIED THE RULE OF LENITY AND OTHER TOOLS OF STATUTORY INTERPRETATION TO LIMIT PROSECUTORS' EXPANSIVE APPLICATIONS OF FEDERAL CRIMINAL STATUTES.

This case presents another instance of federal prosecutors pressing a criminal statute beyond the limits of its language to reach conduct that Congress never contemplated. This Court has stepped in repeatedly in the past to curb such efforts and return criminal statutes to the limits that their text and principles of statutory interpretation require. The court of appeals' impermissibly broad reading here of the phrase "obtaining of property from another," 18 U.S.C. § 1951(b)(2), calls once more for the Court's restraining hand.

The Court often invokes the rule of lenity--under which it requires "clear and definite" statutory language before it will choose the harsher of two plausible readings, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)--to establish limits when prosecutors urge broad readings of ambiguous text. Under the rule of lenity,

> the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. . . .

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion). The rule of lenity "is founded on two policies that have long been part of our tradition," *United States v. Bass*, 404 U.S. 336, 348 (1971): that the law should provide fair warning of the line between criminal and noncriminal conduct, and that "legislatures and not courts should define criminal activity," which rests on "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* (quotation omitted); *see, e.g., United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute.").

An early example of the Court restricting an expansive application of a criminal statute is *Hammerschmidt v. United States*, 265 U.S. 182 (1924). The federal statute at issue (now codified at 18 U.S.C. § 371) makes it a crime to engage in a conspiracy "to defraud the United States in any manner

or for any purpose." Federal prosecutors argued successfully in the district court that circulating handbills openly encouraging persons to disobey the Selective Service Act violated the statute. The Sixth Circuit affirmed the convictions over a vigorous dissent. *Hammerschmidt v. United States*, 287 F. 817 (6th Cir. 1923). This Court reversed. It held that a conspiracy to "defraud" the government required "deceit, craft or trickery," or at least "means that are dishonest." 265 U.S. at 188. The Court rejected the government's position, embraced by the lower courts, that the statute made criminal "mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it." *Id.* at 189.

The Court confronted similar circumstances in *McBoyle v. United States*, 283 U.S. 25 (1931). The defendant stole an airplane and flew it across state lines. He was prosecuted and convicted under a statute that punished the knowing interstate transportation of a stolen "motor vehicle," defined to include "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." *Id.* at 26. The Tenth Circuit affirmed. *McBoyle v. United States*, 43 F.2d 273 (10th Cir. 1930).

This Court reversed. It acknowledged that the government's interpretation of the word "vehicle" was plausible, but it viewed the statutory definition of "motor vehicle" as "call[ing] up the popular picture" of "a vehicle running on land." 283 U.S. at 26. The Court concluded:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.

Id. at 27.

The Court stepped in again in *Williams v. United States*, 458 U.S. 279 (1982). In *Williams*, prosecutors argued that depositing bad checks violated 18 U.S.C. § 1014, which prohibited false statements to federally insured banks and willfully overvaluing property for the purpose of influencing a bank's action. The jury convicted the defendant, and the Fifth Circuit affirmed. *United States v. Williams*, 639 F.2d 1311 (5th Cir. 1981). This Court reversed, holding that the presentation of a check was neither a "false statement" nor an overvaluation of property. *See* 458 U.S. at 284-86. The Court

observed that "when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.'" *Id.* at 286. After reviewing the legislative history of § 1014, the Court concluded:

> Given this background--a statute that is not unambiguous in its terms and that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law--we believe that a narrow interpretation of § 1014 would be consistent with our usual approach to the construction of criminal statutes.

Id. at 290. To buttress this conclusion, the Court invoked the rule of lenity. *Id.*

The Court reined in another expansive interpretation of a federal criminal statute in *Cleveland v. United States*, 531 U.S. 12 (2000). The *Cleveland* defendant was charged with obtaining through fraud unissued, non-transferable licenses to operate video poker machines. The question was whether those licenses, in the hands of the issuing government agency, amounted to "property" for purposes of the mail fraud statute. The government insisted that they did, and the Fifth Circuit agreed. *United States*

v. Bankston, 182 F.3d 296, 309 (5th Cir. 1999). This Court reversed. It found that the state's "right to control the issuance, renewal, and revocation of video poker licenses" under state statute did not make the unissued licenses "property," even "when tied to an expected stream of revenue." 531 U.S. at 23. The Court again invoked the rule of lenity, which it found "especially appropriate" because mail fraud is a predicate offense under RICO. *Id.* at 25.

The honest services cases provide the most striking instance of this pattern of prosecutorial expansion, acquiescence by the lower courts, and limits imposed by this Court through the rule of lenity. In *McNally v. United States*, 483 U.S. 350 (1987), the Court rejected the lower courts' near-uniform interpretation of the mail and wire fraud statutes to include schemes to deprive others of the intangible right to honest services--a vague, judge-made concept with no basis in the language or history of 18 U.S.C. § 1341. The Court applied the rule of lenity and declared that "[i]f Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360.

Congress responded to *McNally* by enacting an honest services fraud provision, 18 U.S.C. § 1346, and the cycle began again: prosecutors pushed ever more expansive notions of "honest services" and the lower courts largely accepted those theories, subject to divergent and ineffectual limiting principles. In *Skilling v. United States*, 130 S. Ct. 2896 (2010), this Court confronted the argument that § 1346 was so standardless, even as construed by the lower courts,

that it should be held void for vagueness. Rather than declare the statute unconstitutional, the Court looked to its core applications, invoked the rule of lenity, and held that § 1346 extends only to schemes involving bribes and kickbacks. *See* 130 S. Ct. at 2932-33.

These decisions, spanning almost a century, share several features. In each case, Congress enacted a criminal statute directed at a discernible core of conduct. In each case, federal prosecutors sought to push the boundaries of the statute to include conduct that Congress did not contemplate. In each case, at least some lower courts acquiesced in the prosecutors' novel and expansive theories. And in each case, this Court applied the brakes, based on the statutory text, Congressional intent, and the principles that the rule of lenity embodies. As we discuss in more detail in Part III, this case once again requires the Court's firm hand to curb an impermissibly broad reading of a federal criminal statute.

II. THIS COURT HAS REQUIRED A CLEAR STATEMENT FROM CONGRESS BEFORE IT WILL INTERPRET A FEDERAL CRIMINAL STATUTE TO SHIFT THE FEDERAL-STATE BALANCE IN LAW ENFORCEMENT.

The Court has invoked a second principle of interpretation to curb expansive readings of federal criminal statutes: that the federal government should not intrude into areas of criminal law en-

forcement traditionally left to the states, absent a clear statement of Congressional intent. *See, e.g., Cleveland*, 531 U.S. at 25 ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." (quotation omitted)); *McNally*, 483 U.S. at 360 (interpreting mail fraud statute not to include honest services in part to avoid "involv[ing] the Federal Government in setting standards of disclosure and good government for local and state officials"); *Williams*, 458 U.S. at 290 (construing statute narrowly in part because the case involved "a subject matter that traditionally has been regulated by state law").

The Court squarely addressed these federalism concerns in *Rewis v. United States*, 401 U.S. 808 (1971). The statute at issue--18 U.S.C. § 1952--made it a crime to "travel[] in interstate or foreign commerce or use[] any facility in interstate or foreign commerce" with intent to "promote, manage, establish, carry on, or facilitate" illegal gambling. The defendant ran a gambling operation in Florida. He did not cross state lines, but some of his customers traveled from Georgia. The government argued that the statute applied to the defendant, despite his lack of interstate travel, because his customers crossed state lines.

The Court rejected this broad interpretation. It noted that § 1952 "was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." 401 U.S. at 811.

The Court found significant that the broad interpretation the government advocated "would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." *Id.* at 812. The silence of the legislative history on these issues, the Court concluded, "strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State." *Id.*

The Court reiterated this point the next Term. In *United States v. Bass*, 404 U.S. 336 (1971), the Court had to decide whether a statute that prohibited certain classes of persons from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm" required proof in a "possession" case of an interstate commerce nexus. *See id.* at 339. After analyzing the text and legislative history of the statute, the Court found it ambiguous. *See id.* at 347. The Court rejected the government's broad interpretation based on "two wise principles this Court has long followed." *Id.* First, it turned to the rule of lenity, which requires that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Id.* at 348.

Second, the Court relied on the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at 349. It observed that

"Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." The Court declared that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* "Absent a clearer statement of intention from Congress than is present here," the Court concluded, it would not interpret the statute to reach "the 'mere possession' of firearms." *Id.* at 350.

As we discuss in the next part, this case--like *Bass*--involves "conduct readily denounced as criminal by the States." The Hobbs Act provision at issue should thus be narrowly interpreted.

III. THIS CASE IMPLICATES THE CONCERNS THAT HAVE CAUSED THIS COURT TO INTERPRET FEDERAL CRIMINAL STATUTES NARROWLY.

Petitioner's brief demonstrates that a straightforward application of this Court's decision in *Scheidler v. NOW*, 537 U.S. 393 (2003), requires reversal. But to the extent ambiguity exists in the phrase "obtaining of property from another," the Court should again apply the rule of lenity and the requirement that Congress speak clearly before a federal criminal statute will be interpreted to shift the federal-state balance. *See, e.g., United States v. Enmons*, 410 U.S. 396, 411 (1973) (invoking rule of lenity and "clear statement" rule in support of nar-

row reading of the Hobbs Act). The court of appeals' reading stretches the statutory text beyond its core meaning, beyond what Congress intended in enacting the Hobbs Act, and into an area that the states already "denounce[] as criminal" through the offense of coercion.[2]

As petitioner's brief explains, the text and history of the Hobbs Act require a narrow interpretation of the "obtaining . . . property" language. The statutory text, especially as interpreted in *Scheidler*, cannot plausibly be read to encompass an effort to influence a non-binding recommendation by a salaried attorney for a state agency. However deplorable petitioner's alleged conduct may have been, it did not have as its goal the "obtaining" of "property" from the attorney. The petitioner did not seek to "acquire" the attorney's recommendation, nor was the recommendation something that petitioner (had he somehow "acquired" it) could "exercise, transfer, or sell." *Scheidler*, 537 U.S. at 405.

The history of the Hobbs Act confirms that Congress chose to exclude from the statute's scope alleged conduct of the kind at issue here. Congress patterned the Hobbs Act on a New York statute that prohibited extortion. A separate New York statute prohibited coercion. Congress chose to include the extortion provision in the federal statute but to omit the coercion provision. The difference between

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[2] *See, e.g.*, Ala. Code § 13A-6-25; Colo. Rev. Stat. § 18-3-207(1); N.Y. Penal Law §§ 135.60, 135.65; Ohio Rev. Stat. § 2905.12; Or. Rev. Stat. § 163.275; Tenn. Code Ann. § 39-14-112(a)(2); Rev. Code Wash. § 9A.36.070.

extortion and coercion is that extortion requires an effort to "obtain[] . . . property," while coercion prohibits the use of threats to "restrict another's freedom of action." *Scheidler*, 537 U.S. at 405. As the Court observed in *Scheidler*, "Congress' decision to include extortion as a violation of the Hobbs Act and omit coercion is significant assistance to our interpretation of the breadth of the extortion provision." *Id.* at 406. Here, that decision shows that Congress meant to exclude from the statute's scope threats designed--like petitioner's alleged threat--to influence another's actions without obtaining property from him.

The statutory text and history suffice to interpret the statute as petitioner urges. But "[e]ven if the language and history of the Act were less clear . . . the Act could not properly be expanded as the Government suggests--for two related reasons." *Enmons*, 410 U.S. at 411. First, the "fair warning" principle that Justice Holmes invoked in *McBoyle* and that finds expression in the rule of lenity is strongly implicated here. Had petitioner consulted the text of the Hobbs Act, as interpreted by this Court in *Scheidler*, he would not have had warning--"fair" or otherwise--that his alleged effort to influence the state lawyer's non-binding recommendation would violate the statute.

Second, Congress did not "convey[] its purpose clearly" (or, indeed, at all) to "define as a federal crime" conduct that is *already* "denounced as criminal" by the states, including New York. *Enmons*, 410 U.S. at 411 (quoting *Bass*, 404 U.S. at 349).

Indeed, the state had begun prosecuting petitioner for coercion and could have pursued that process to conclusion in the state courts but chose not to.

For these reasons, the Court should--as it has in decisions from *Hammerschmidt* to *Skilling*--interpret the criminal statute at issue narrowly, to include only conduct that "'plainly and unmistakably'" falls within its scope. *Bass*, 404 U.S. at 348 (quoting *Gradwell*, 243 U.S. at 485).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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